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INDIAN STATES

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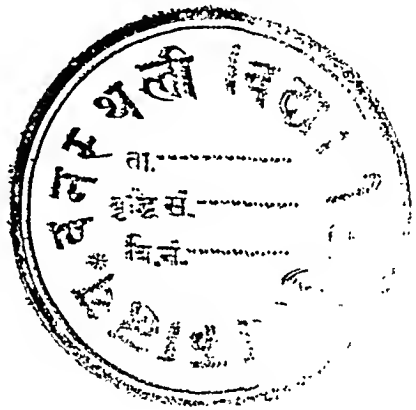

KITABISTAN
ALLAHABAD

First Published in 1941

PRINTED BY J. K. SHARMA AT THE ALLAHABAD LAW JOURNAL PRESS, ALLAHABAD AND PUBLISHED BY KITABISTAN, ALLAHABAD

DEDICATED

TO

DEWAN BAHADUR

S. ARAVAMUDU AIYANGAR

THE EMINENT CONSTITUTIONAL LAWYER

AUTHOR'S PREFACE

A grave violence is done to history when it is irresponsibly stated that the States are the creations of British rule. The Indian States have an important rôle to play in the birth and development of the Indian Federation. They have played a conspicuous part as training ground of Indian statesmen.

In any view, territorial rearrangement of Indian States by incorporating the numerous petty principalities into either the adjacent provinces or neighbouring major states is a *sine qua non* for ensuring a minimum standard of civilized administration.

The major states should turn into constitutional monarchies; they would do well to emulate herein the modern incumbents of the British throne. The establishment of responsible government in such states, by stages if necessary, is the only way of restricting paramountcy to its proper field of action.

The aim of the author has been to present a true and fairly complete picture of the Indian States. The vital facts connected with Indian States have suffered distortion alike at the hands of their protagonists and

at those of their critics. It is hoped that this humble contribution will be generally useful to the state-subjects, the rulers of Indian States, the representatives of the Paramount Power, the lawyers and finally, the students.

The author thanks the Editor of the *New Review* of Calcutta in which a few chapters of this work had been published as special articles.

University of Allahabad
July 1, 1940

K. R. R. SASTRY

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CHAPTER I

HISTORICAL INTRODUCTION

The Indian states form an almost continuous chain of land-locked territories down the spine of India, surrounded by the narrow strips of sea coast which were occupied by the English in the course of their acquisition of power.....The Indian states are in general the "inaccessible and less fertile parts of the Indian peninsula."[1] The trading company initially required the "coastal tracts and the valleys of the great navigable rivers, accessible from the sea, rich in agricultural products and densely inhabited by a docile population to whom goods from Europe might be sold." The East India Company was "well content to leave the poorer uplands with their hunters and intractable, hardy peasantry, to themselves and their own rulers."[2]

Some of these states had maintained an "independent existence for hundreds of years and some States including Hyderabad and Travancore and many of the Rajput and

[1] *The British Crown and the Indian States*, p. 137.
[2] *Indian States and Ruling Princes.* Sir Sydney Low, p. 10.

other states have never been conquered or annexed."[3] For the most part the Indian states are "survivals of former dynasties and powers, which in one way or another continued to prolong their existence after the collapse of the Moghul Empire and the ensuing struggle for supremacy which ended in favour of the British. Some of them while the Moghul Empire still stood, had been able to establish themselves in a position of practical independence, yielding only a nominal allegiance to the Emperors of Delhi and were able later to secure recognition from the British power. Others of them, such as the Rajput States of Central India had been engaged for centuries in conflict first with the Moghuls later with the Mahrattas and were only rescued from extinction by British intervention which secured them in possession of such territories as they had been able to retain. Still others were principalities carved out during the short-lived period of Mahratta domination in Western India by soldiers of fortune, who came to terms with the British forces which broke up the Mahratta confederation."[4]

In March 1804, Lord Castlereagh wrote that "it

[3] Press Statement of Sir C. P. Ramaswamier, Dewan of Travancore, dated February 7th, 1940.

[4] Sir Benjamin Lindsay in the *Journal of Comparative Legislation and International Law*. Feb. 1938, pp. 91-92.

has not been a matter of choice but of necessity, that our existence in India should pass from that of traders to sovereigns. If we had not, the French would long since have taken the lead in India to our exclusion." In 1806, the Duke of Wellington noted that the British Government had become paramount in India by the conquest of Mysore. There is point in Sir Charles Aitchison's view that the campaigns against the Mahratta chiefs in 1803, and Holkar in 1805 established once for all the supremacy of British power. On July 12th 1803, Sir George Barlow wrote thus: "With respect to the French, supposing the present questions in Europe not to lead to an immediate rupture, we are now certain that the whole course of their policy has for its object the subversion of the British Empire in India and that at no distant period of time they will put their plans in execution. It is absolutely necessary for the defeat of these designs that no native state should be left to exist in India which is not upheld by the British power or the political conduct of which is not under its absolute control." It is curious that this "compendious description of Lord Wellesley's aim should have been recorded by an officer who abandoned it."[5]

Thus by the beginning of the nineteenth century,

[5] Tupper, "Our Indian Protectorate," p. 33.

British supremacy had been consolidated over the major portion of India, and by 1818, there was no power in India except the Sikh state of Ranjit Singh, in a position to claim independence. In his just Minute on Bharatpur, Metcalfe wrote: "We have become the Paramount State in India." Till 1829 in his correspondence with the Governor-General the Nizam used the phrase '*Ma ba Dawlat*' and the Governor General '*Niaz mund*' which admitted an inferiority of rank. The formal homage continued to be offered to the Great Moghul till the cold season of 1842-3 when it was prohibited by Lord Ellenborough. With the extinction of the Sikh kingdom after the Second Sikh War (1848-49) all state-territory in India was under British suzerainty.

After the suppression of the Mutiny (1857-8) which was effected with the timely and substantial aid of many of the state-rulers, the British Crown assumed the direct government of India as being in the words of Lord Canning the first Viceroy, "the unquestioned ruler and Paramount Power in all India."

The stages by which Paramountcy as a hard fact was driven home to the most exalted of the Rulers by Lord Reading in 1926, may here be indicated. The 'Ring-
1. fence' policy of the much maligned Warren Hastings,
2. the Subsidiary System of Wellesley, the Subordinate
3. Cooperation under Lord Hastings, Lord Curzon's

policy of patronage and "intrusive surveillance," and the period of cordial cooperation since 1905 indicate distinctly the well-marked stages in the policy followed in reference to these states.

Thus the earlier Treaties contain the following among other phrases "mutual amity, friendly cooperation, reciprocal obligation, alliance, true friendship, good understanding, perpetual friendship, firm alliance." (Vide Art. I, Treaty with Nizam, 12-11-1766: Art. V, Treaty with Baroda, 8-3-1802: Art. IX, Treaty with Travancore of 1805; Art. I, Treaty with Gwalior, 30-12-1803). The character of independence possessed by the states prior to 1813 is clear for example from Art. 14 of the Gwalior Treaty of 1803 which runs as follows:— "In order to secure and improve the relations of amity and peace hereby established between the Governments it is agreed that *accredited ministers* from each shall reside at the Court of the other." (Italics author's).

It has to be remembered that the supremacy of the British Government in the "international politics of India.....was at first dictated by practical considerations,"[6] to wit, those extinguishing the influence of the French at the courts of Hyderabad, Scindia and others.

[6] Ruthnaswamy *British Administrative System in India*, p. 592.

"I have no doubt," wrote Wellesley, "that the natural effect of the unchecked growth of such a party (the French party) at the court of one of our principal allies must be in a very short time to detract that court entirely from our interests and finally to fix it in those of our enemies, to subject its councils to their control and its military establishments to their direction."[7] This policy of promoting British supremacy received a check in Cornwallis' second governor-generalship. The reports of the Residents at Poona and Hyderabad were replete with accounts of anarchy and disaffection. Cornwallis himself was obliged to write to Lord Lake on 20th August 1805 that "unless the British Residents exercised a power and an ascendancy that they ought not to exert other governments would be immediately dissolved." As Prof. Ruthnaswamy very pragmatically put it "the policy of non-interference was made impossible by the facts of international politics in India."[8] The inability of the Gaekwar's administration to secure his revenues from his feudal chiefs and the Travancore disorders of 1811 had led respectively to Col. Walker's pacification and Col. Munro's holding the inconsistent posts of Administrator and Resident.

[7] Martin, *Wellesley's Despatches*, Vol. I, p. 5.
[8] Ruthnaswamy, *British Administrative System in India*, p. 594.

The shifting from an international to an imperial plane is clearly indicated from the administration of Lord Hastings. Treaties have had introduced the obligation of "acting in subordinate cooperation with the British Government and acknowledging its supremacy." (Vide e.g., Art. III, Treaty with Udaipur, dated 13-1-1818: Art. III, Treaty with Jodhpur, dated 6-1-1818: Art III Treaty with Bikaner, dated 9-3-1818.) In 1827, the right to take part even in the internal arrangements of Kolhapur was introduced by treaty.

The forty years from 1818 to 1858 witness the "growth and establishment of the imperial idea." The Indian states have lost the "character of independence not through any epoch-making declaration of British Sovereignty, but by a gradual change in the policy pursued towards them by the British government."[9] Within four months of his arrival in India, Moira wrote in his private journal thus:—"Our object ought to be to render the British government paramount in effect, if not declaredly so."[10] Hastings has removed the problem of the Indian states "from the province of the international lawyer, and transferred it to that of the practical statesman and the political philosopher where it has rested

[9] Westlake, '*Collected Papers*', p. 205.

[10] *The private Journal of Marquis of Hastings*, Vol. I, pp. 54-55, dated February 6th, 1814.

ever since."[11] Active administrators and political agents had a fascinating temptation to reduce the enfeebled Rulers to further dependence.

After 1834, the East India Company also made a practice of insisting that no succession could take place without the sanction and the approval of the Company. Then the Company is found gradually advising the princes in their choice of ministers.

The states which had been created by the Company's arms, which were conquered and regranted by the Company and states which had been dependent on Peshwa and on his being overthrown to the Company, were restricted by Lord Dalhousie from adoptions in the case of failure of natural heirs.

It is historically correct to state that "the rise of British power brought with it a new stability to many of India's most ancient dynasties and rescued or at least ensured the survival of others which without its aid would certainly have foundered "during the eighteenth century. There were some other states "which disappeared after challenging unsuccessfully the British power, others through their own inherent weakness and corruption, others again through the failure of natural heirs, and the application of the doctrine of

[11] Dr. Mehta, *Hastings and the Indian States*, p. 262.

lapse."[12]

Post-Mutiny Stabilization

With the loyal cooperation of the Indian rulers, of whom the Nizam deserves special mention holding as he did a key position in the South, the Mutiny was quelled. "The Crown of England" wrote Lord Canning, "stands forth the unquestioned ruler and paramount power in all India and is for the first time brought face to face with its feudatories. There is a reality in the suzerainty of England which has never existed before and which is not only felt but eagerly acknowledged by the chiefs." Prior to 1838, there had been "alternations to *laissez faire* and intervention which often ended in annexation in cases of misrule or anarchy or revolt or lapse of heirs. As part of the general pacification after the Mutiny the British government gave a solemn pledge formally renouncing all wish or intervention to increase British territory by any further annexation."[13] Lord Canning issued Sanads of Adoption to 160 states; seventeen more were issued by Lord Lansdowne.

The period after the Mutiny was the stabilizing one when the Indian political system was built up. Sir

[12] Davidson Committee Report, p. 8.
[13] *The Indian States* (India Conciliation Group, London), p. 7.

Charles Tupper, himself an illustrious expounder of the system has stated the three cardinal principles of the system thus:—

(1) The maintenance of the Supremacy of the Paramount Power which had originated in the policy of Lord Wellesley and Lord Hastings.

(2) The preservation of autonomy of the feudatory states manifest from Canning's times and later affirmations by acts and proclamations of the government.

(3) The denial of any right divine to govern wrong "established by the course taken by the government on many occasions and notably in the annexation of Oudh and the trial and deposition of the Gaekwar of Baroda (1873-75).[14]

The protecting powers of the Paramount Power were extended all round. The Baroda Case (1873-75) and the Manipur Case (1891-92) are significant landmarks. The conditions of the Proclamation of 13th January, 1875 were never to be found in any prior treaty with the Gaekwar. Removal by administrative order of any person whose presence in the state may seem objectionable—as in the arrest, trial and sentence of Jub-

[14] Tupper, *Our Indian Protectorate*, pp. 22-23.

raj of Manipur—could never be justified as "an unquestioned right" as Sir W. Lee Warner would have it, but only as an "act of prerogative justified by necessity rather than a legal power vested in the government of India" (Sydney Low).

Economic Developments

The new unity of India under the Crown, as properly summed up by the Davidson Committee, "began to assume an economic as well as a political complexion... When the cooperation of the states was required in the interests of all India, it was freely and ungrudgingly given. They made free grants of land for the development of India's great railway system, which in 1858 comprised but a few hundred miles" and in 1932 extended to over forty thousand. Over these lands, they ceded civil and criminal jurisdiction in order that the development of trade and communication might not be hampered by a multiplicity of authorities. Cooperation was also forthcoming for the construction of roads and irrigation canals. Many of the states which possessed local currencies and postal systems agreed to abolish them so that their subjects might participate fully in the benefits arising from a central administration of these great public services. Similar progress was made in the removal of the barriers imposed on trade by a multipli-

city of fiscal systems. Practically every state in India had from time immemorial levied transit duties on goods passing through its territories. The growth of the railway system was inimical to this form of taxation and the Princes of India, realizing its incompatibility with modern conditions, agreed to its extinction. Some Rulers further agreed to abolish export and import duties, though the majority of Indian states still depend largely on revenues from this source.

Steps were also taken between 1863-66 to advance the freedom of India's coastal trade. Previously the ports of all Indian states had been treated for customs purposes as foreign, and goods arriving therefrom at Bombay or any other British Indian harbour for shipment to Europe had been subjected to import duties, export from British India being similarly taxed by the States. Arrangements to remove these impediments to trade were made in 1865-66 with certain of the maritime states. In subsequent years this process was further continued until the British Indian sea customs tariff has been adopted by every maritime state in India with the solitary exception of Cutch.

Another development of great importance was the series of salt agreements concluded during the viceroyalty of Lord Lytton (1876-80) with numerous states in Rajputana and in central and western India. Most

of the great salt sources of India are situated in Indian states, and it was essential to secure their cooperation in order to arrange a diminution in the cost of production and transport as well as a more up-to-date and businesslike system for the collection of the salt-tax, which has always been one of the mainstays of Indian finance. "In these arrangements," observe the Davidson Committee very fairly "the cooperation of the States was forthcoming on terms which, though occasionally resented as doing less than justice to individual interest, have proved to be of material benefit to India as a whole."[15]

As Lord Curzon stated in his Bahawalpur speech (1903), the political system of India does not always rest upon a treaty and has grown up under widely differing historical conditions. Under Lord Curzon's regime of 'tutelage and subserviency,' political practice had reduced all the states to conform to a single type. With a good deal of truth it has been stated that "the Paramount Power in actual practice takes upon itself to perform functions in relation to individual states which involve varying degrees of control over their internal government from mere advice upon the spontaneous request of a state, through the stage of unsolicited advice which the state is expected to follow, right up to the stage of com-

[15] *Report of the Davidson Committee*, pp. 13-14.

plete control of the whole administration of a state."[16] As the brilliant proconsul has himself extracted, the following advice to his son by a Ruler on the eve of his abdication graphically pictures the results of the "intrusive surveillance" of the Curzonian regime:—"On this solemn occasion my earnest injunction to you is to be loyal to the British government, and if you have any representation to make to the government, do so in a courteous and respectful manner. Remain always a staunch supporter of the Paramount Power. In your private and public life follow the marriage and other customs of your country, your religion and your family, and by earnest attention to your education qualify yourself for the exercise of ruling powers as soon as you may be of age to receive them."[17]

Era of 'Cordial Cooperation'

The old policy of forbidding mutual intercourse between Rulers was substituted by a policy of cooperation from the time of Lord Minto's viceroyalty. Lord Minto said in 1909:—"I have made it a rule to avoid the issue of general instructions as far as possible and have endeavoured to deal with questions as they arose with re-

[16] *The British Crown and the Indian States*, p. 173.
[17] Curzon, *Leaves from a Viceroy's Note-book*, p. 45.

ference to existing treaties, the merits of each case, local conditions, antecedent circumstances, and the particular stage of development, feudal and constitutional, of individual principalities." The conferences of 1913 and 1914, convened by Lord Hardinge to ascertain the views of the Ruling Princes on "matters of imperial interest and on matters affecting the states as a whole" were the first and tentative attempts towards a collective organization of Princes. These annual gatherings were continued under Lord Chelmsford. The Montagu-Chelmsford Report was published in April 1918. In 1918-1919, the Maharaja of Bikaner attended the Peace Conference in Europe and was one of the signatories of the Treaty of Versailles. The Princes dicussed at their conference the special chapter of the Montagu-Chelmsford Report (Ch. X) dealing with proposals relating to Indian states. The Princes were informed of the intention of the Government in November 1919, to call into being a permanent Chamber of Princes. There was real difference of opinion as to whether all the states or only those possessing full powers should be represented.

The Chamber of Princes, an advisory and consultative body, was formally inaugurated in Feb. 1921 by the Duke of Connaught on behalf of His Majesty. It definitely illustrates the abandonment of the old policy of isolating the states from each other. In his proclama-

tion, the King-Emperor thus outlined the jurisdiction of its deliberations:—"My Viceroy will take its counsel freely in matters relating to the territories of the Indian states generally and in matters that affect those territories jointly with British India or with the rest of my Empire. It will have no concern with the internal affairs of individual states or their rulers or with the relations of individual states to my government, while the existing right of the states and their freedom of action will be in no way prejudiced or impaired." The remark of Sir P. S. Sivaswamy Iyer that the Princes are "afraid of the levelling tendency of any organisation of this sort" has had confirmation from the princely order itself.

Lord Reading's Letter

Lord Reading took occasion in his letter dated 27th March 1926 to the Nizam on the Berar Question to give an extension of paramountcy as "based not only upon treaties and engagements but existing independently of them and quite apart from its prerogative in matters relating to foreign powers and policies." He stressed the *hard fact* that "no ruler of an Indian state can justifiably claim to negotiate with the British government on an equal footing."

This raised alarm in the chancellories of the princes and as a result of a conference, the Viceroy, Lord Irwin,

was persuaded to recognize "the necessity of having the nature of the relationship between the states and British India properly examined and defined." As K. M. Panikkar put it "the relationship between the states and the Crown which extended now for over a century and quarter, had remained nebulous and inchoate"....."a hundred years of political somnolence had, in the case of many states, led to an ignorance inconceivable today of the rights of the states and where such rights were cherished the documents were often incomplete."[18] Eminent counsel as Sir Leslie Scott (now Lord Justice Scott) were consulted by the Princes and their case was presented before the Butler Committee. This Committee published their report in February 1929. It accepted the claims of the states that their treaties were with the Crown, and that the relationship thus established could not be transferred to a new government without their consent and also held that whether or not a state makes a contribution to the cost of defence, the Paramount Power is under a duty to protect it." On the main question of Paramountcy it laid down in a vein of all-pervasive vagueness that "Paramountcy must remain paramount, it must fulfil its obligations, by defining and adapting itself ac-

[18] K. M. Panikkar: "*The Indian Princes in Council*," pp. 20 and 22.

cording to the shifting necessities of the time and the progressive development of the states." The states felt their position worsened than before when the committee further observed that "usage lights up the dark places of the treaties."

At the session of the Chamber of Princes (February 1930) the Butler Committee Report was fully discussed and the comprehensive resolution that was passed *inter alia* controverted the position that "sanads imposed by the Paramount Power can supersede previously existing treaties or engagements between it and a state."

The Chamber was of opinion that "the doctrine of Usage and Political Practice as expounded by the Indian States Committee is neither sound in its conception nor fair in its application to the relations subsisting between the Crown and the Indian states. That doctrine has in the past been the cause of serious and unjustifiable encroachments upon the internal sovereignty and autonomy of the Indian states which are recognized by solemn Treaties, Engagements and Sanads."

"That a course of practice followed with respect to individual states by the Political Department of the Government of India in certain eventualities which has neither been consistent or uniform or to which from time to time exception has been taken by the states concerned or which arose during minority, joint administration or

any such *inter regnum* when the Government of India held the position of trustee with reference to the state concerned, cannot afford any basis for intervention by the Government of India to the prejudice of the acknowledged rights of the states."

It was also resolved that the Narendra Mandal places on record its considered opinion that the true relationship of the states with the Crown is founded upon

(*a*) treaties and engagements which bind parties and
(*b*) usage which is established by mutual consent.

The representatives of the states exerted great influence at the Round Table Conferences. A federation of British India and Indian states was made feasible by the willingness of the Princes to come into the Federation. The Davidson Committee was appointed in 1932 to determine how far and in what respects the attainment of an ideal system of federal finance was affected by two particular elements in the existing situation:—(1) The ascertained existing rights of certain states and (2) certain contributions of a special character which many states are now making or have made in the past to the resources of the Indian Government.

The Federal Finance Committee of the Third Round Table Conference was appointed to consider the question

of Federal Finance in the light of the Percy Report, Davidson Report and suggestions in the Secretary of State's statement of 6th December 1932. It consists of four representatives of Indian States in a Committee of fifteen.

The scheme of the Government of India Act 1935 is a federation consisting of the component parts of British India and Indian States. The authors of the Act have had to incorporate in one and the same political structure two fundamentally different polities, the British Indian Provinces and the Indian States. In the federal Assembly the Indian states have been given the right of sending 125 representatives to a body 375 strong; in the Council of State, the Indian states would send not more than 104 representatives while British India would send 156 members. The conditions of the Federation to be brought into existence are that states—the Rulers whereof will be entitled to choose not less than 52 members of the Council of State and the aggregate population whereof amounts to at least one-half of the total population of the states—should have acceded to the federation. The Ruler will have to execute an Instrument of Accession to specify which of the matters mentioned in the legislative list he accepts as matters with respect to which the Federal Legislature may make laws for his state and his subjects. As the Solicitor-General said, "the whole

principle of the Federation is that the Ruler shall remain ruler of his state and his subjects shall therefore remain his subjects, the Ruler undertakes to see that the provisions of the Act are enforced in his state.....As the Crown controls the foreign relations of the states, the Crown performs these services for the subjects of the states—that is to say—they get passport from the Crown, and if there were any case in which communications were necessary with a foreign government in regard to something that had happened or had been done by a subject of the state, that correspondence would take place between the foreign government and the Government of India or if necessary, His Majesty's Government (in England). They are known as British protected persons for that purpose when they are outside their own territory."

CHAPTER II

CLASSIFICATION OF INDIAN STATES

There were 562 Indian states when the Butler Committee graded them into three classes.

I.	States, the rulers of which are members of the Chamber of Princes in their own right	109
II.	States, the rulers of which are represented in the Chamber of Princes by twelve members of their order elected by themselves	126
III.	Estate Jagirs and others	327
	Total ..	562

The latest '*Memoranda on Indian States*' published by Government contain 601 states. In size, population, and financial resources there is a vast dissimilarity between these states *inter se*. Their whole area is 712,508 square miles, while the area of British India is 1,006,171 square miles. Their population is 81,310,845 while the population of British India is 271,526,933. They

range in size from Hyderabad with a population of 14 millions and an annual revenue of eight and a half crores of rupees (£6,315,975) to the state of Bilbari, a tiny speck too small for the map having a population of 27 souls and an annual revenue of eighty rupees (£6).[1]

The first two classes mentioned by the Butler Committee have in "greater or less degree political power legislative, executive and judicial over their subjects." This classification may have some value for settling questions of precedence. Classifying the Indian states on membership to the Chamber of Princes is neither scientifically correct nor historically sound. The area of 109 out of these little states out of third class is from 10 to 100 square miles, of 116 is from 1 to 10 square miles, of 13 is even less than one square mile.

Mr. Shanti Dhawan has made some "extraordinarily revealing comparisons between these widely differing states in points of size and financial resources. Of 283 Kathiawar states, excluding the nine richer states of Bhavanagar, Cutch, Dhrangdhara, Gondal, Idal, Junagarh, Morvi, Navanagar and Porbandhar, the remaining 274 states have a total revenue of about 135 lakhs of rupees (£1,012,500). This sum has to main-

[1] '*What Are the Indian States*': A. I. S. Peoples' Conference. Research Bureau, p. 7.

tain 274 ruling families and also run 274 separate, semi-independent administrations. The total area of these 283 states is about 32000 square miles and their total population is 4 millions. This provides the people of Kathiawar excluding the largest states, with one separate state for every 25 square miles of area, or every 500 heads of population."

In another reading of these details, 202 states in India have each an area less than 10 square miles and 139 less than 5 square miles, 70 states have each an area not exceeding one square mile.

When the Indian States' Committee made their survey (1928) 30 states had alone legislative Councils. 40 states had High Courts. 34 states had separated executive from judicial functions. 56 states had a fixed privy purse. 46 states had a graded civil list of officials. 54 states had pension or provident fund schemes.[2]

Out of 601 states, only 212 make regular cash payments as tributes. "These are both arbitrary and unequal in their incidence on individual states."[3]

With 40 states alone there are treaties; with the rest there are *Sanads* and engagements.

Joseph Chailley's division of the Rulers of Indian

[2] This information is to be supplemented by the Reforms since then carried out in Sitamau, Aundh, Banswara, and Benares.

[3] *Davidson Committee Report*, Para, 64.

States into three classes has to some extent been altered particularly after the introduction of provincial autonomy in British India. The classification is still juridically correct since in the atmosphere of a Federation-to-come the Princes were "always preoccupied with the theory of Paramountcy, their own treaty-rights, and the economic grievances under which they had been labouring for a long time."[4] His classification ran thus:—

I. "The very few who govern according to European ideas of order and justice and who seem to take a personal interest in the welfare of the people."

II. "Those who have introduced the elements of a reformed organisation, have enacted laws, have appointed a wazir to govern for them and relieve them of responsibility."

III. "Those who still imagine that they are the state, that its resources are private property, that its inhabitants are their slaves and that their chief business is pleasure."

Though the number of states introducing reforms has increased the basis of division is still sound.

Sirdar D. K. Sen has classified Indian states under

[4] Raghubir Sinh of Sitamau. *Indian States*: p. 196.

seven divisions graded according to their respective *de jure* and *de facto* status. It has become a moot question whether these series of relationships that have grown up between the Crown and the Indian Princes under widely differing historical conditions have not been made gradually to conform to "a single type."[5] As Lord Reading took occasion to remove all misconceptions in his letter to the Nizam "the title 'Faithful Ally' which your Exalted Highness enjoys has not the effect of putting your government in a category separate from that of other states under the paramountcy of the British Crown."

What one fails to appreciate in Sirdar D. K. Sen's classification is the resurrection of the dead past in his classification of states which paid tribute to other states as Jodhpur, Kotah, Bundi, and Jaipur. An examination of their treaties does not at all put them a whit lower in status for the matter of this historical complex.

Some Indian states have their legislation, administration and civil and criminal jurisdiction. As the Joint Parliamentary Committee put it, "the more important States enjoy within their own territories all the principal attributes of sovereignty, but their external relations are in the hands of the Paramount Power. The sovereignty of others is of a more restricted kind and over others

[5] *Lord Curzon's Bahawalpur Speech*, 1903.

again the Paramount Power exercises in various degrees an administrative control."[6]

The division of Indian states according to their jurisdictional authority can be made with reference to persons and offences. Hyderabad, Gwalior, Indore, Bhopal, the Phulkian states of Punjab, (Patiala, Jhind, and Nabha) and the Rajputana states, Udaipur, Bikaner and Jodhpur can be cited as instances of full-powered states. An examination of illustrative clauses from the treaties of some of these states may be made at this stage. In the Treaty of general defence and protection with the Nizam of Hyderabad of 12-10-1800, the Company's government states through Art. XV that "they have no manner of concern with any of H. H.'s children, relations or subjects or servants with respect to whom H. H. is absolute." In the Gwalior Treaty of Alliance of 27-2-1804 in Art. 8 are found the words, "and it is further agreed that no officer of the Honourable Company shall ever interfere in the internal affairs of the Maharaja's government." Art. 10 of the Indore Treaty of 1818 also runs thus:—"the British Government hereby declares that it has no manner of concern with any of the Maharaja's children, relatives, dependants, subjects or servants with respect to whom the Maharaja is absolute." Again,

[6] *J. P. C. Report*, Vol. I, Part I, p. 2.

in the Treaty with Patiala dated 5th May 1860, Cl. I runs as follows:—"The Maharaja Saheb.....and his successors will.....exercise sovereignty with peace of mind and in perfect security, in accordance with ancient custom."

In the second class of states, the exercise of internal sovereignty is found subject to "following or listening to the advice of the British Government." The Gaekwar of Baroda under the Treaty of 8th March 1802, Art. 5 is to "listen to advice" of the British Government in all that "may appear to be for the good of the country." Under the Treaty with Kolhapur of 1862, "in all matters of importance the Raja of Kolhapur agrees to follow the advice of the British Government as conveyed by the political officer representing the Government at Kolhapur." This is carried to great detail in the Treaty of Perpetual Friendship and Alliance with Travancore dated 1805. Under Art. 9, His Highness "promises to pay at all times the utmost attention to such advice as the English Government shall occasionally judge it necessary to offer to him with a view to the economy of his finances, the better collection of his revenues, the administration of justice, the extension of commerce, the encouragement of trade, agriculture and industry or any other objects connected with the advancement of H. H.'s interests, the happiness of his people and the mutual

welfare of both states." Again Cl. 9 of the Cochin Treaty of Perpetual Friendship of 1809, certainly restricts the power of the prince to introduce material changes in the administration without the advice of the British Government. Even in the Mysore Treaty revised in 1913 there is a clause that no material change in the administration in force should be introduced without the consent of the Governor-General in Council.

Under the third class come states which "have either permanently or temporarily granted to the Crown important rights of internal sovereignty or have accepted either expressly or tacitly, restrictions on their internal sovereignty." The Kathiawar states other than the first class states fall into this category. The Sanad states of Bundelkhand and some Simla Hill states are further instances. The Sanads restoring full criminal jurisdiction to the states of Bundelkhand provide that "Sentence of death shall immediately be reported to the Agent to the G. G. and be subject to confirmation by the Agent; and that periodical reports shall be submitted by the Chief to the local British Police Officer of all cases in which sentences of transportation or imprisonment for life are passed by him."

The fourth class of states have restricted internal sovereignty subject to the control of the British Government wherever deemed necessary. Cl. 3 of the Sanads

of 1915 issued to Behar and Orissa Tributary and Vassal states—their legality has been questioned—demands that the ruler "shall conform in all matters concerning the preservation of law and order and the administration of justice generally, within the limits of (his) state, to the instructions issued from time to time for his guidance by the Lieutenant Governor of Behar and Orissa in Council." Cl. VIII expects compliance "with the wishes of any officer duly vested with authority in this behalf by the Lieutenant Governor of Behar and Orissa in Council" in all "important matters of administration." The Sanads granted in 1937 to the Rajas of 26 Orissa states contain the following in Cl. 6. "That (the Ruler) shall act in accordance with such advice as may be given to (him) by the Agent to the Governor-General, Eastern states, or such other political officer as may be vested with authority in this behalf by His Excellency, the Viceroy."

An examination of the changes in the status effected in the state of Mayurbhanj reinforces the irresistible conclusion that since 1894, the Paramount Power has been making an increasing number of inroads into the undoubted internal sovereignty of Mayurbhanj. The provisions in the Sanad of 1894 relating to criminal powers and the clause which required the Chief to "comply with the wishes" of the superintendent even in mat-

ters of detail of almost all the branches of administration —these two curtailments it is submitted, could not be justified either from past history of the state, the Treaty of 1829 or any other source of legal rights. Under the discretionary provisions of the Sanads (given in 1908, 1915 and 1937) the criminal powers of the Maharaja have however been extended.

Regarding Simla Hill states, Cl. 2 of the *Ikrarnama* entered into *e.g.*, by the Raja of Nalagarh recognizes the right of subjects of the state to appeal to the local British Agent against oppression and injustice and under Art. 3 the Raja engaged himself "on pain of forfeiture of grant to pay implicit obedience to any advice or remonstrance which the British Agent may have occasion to offer."

Typical of the feudatory class of states which might have misled Sir Charles Tupper to develop his theory of feudal relationship are the fifteen chiefs in the Central Provinces to whom adoption sanads were granted in 1865. They executed an agreement which commenced as follows:—

"I am a Chieftain under the administration of the Chief Commissioner of Central Provinces. I have now been recognized by the British Government as a feudatory subject to the political control of the Chief Commissioner or of such officer as he may direct me to subordinate myself to."

Last of all come the petty states of Kathiawar and Gujerat (286 in number) which are organized in groups called *Thanas* under officers appointed by the local representatives of the Paramount Power who exercise various kinds and degrees of criminal, revenue, and civil jurisdiction.

CHAPTER III

CONSTITUTIONAL CHARACTERISTICS

Problems relating the position of the Indian states cannot be satisfactorily discussed with reference to purely juristic criteria. In view of the admitted facts, any attempt to evolve a formula must be a failure. Thus, judgment on the matter on one side or the other must be more or less arbitrary.

The status of Indian States has had examination by a bewildering variety of writers from the shallow globe-trotter upto the serene constitutional expert. Nor can it be forgotten that protagonists of State-rights have contributed works with a special bias. The Indian States Committees' examination of the legal position of the Indian States has been jejune as stated by Mr. D. B. Somervell, K. C. in a later contribution of his.[1]

Indian states are *political* communities. This constitutional position can be taken as having been recognized all round. The following treaty-provisions abundantly fortify this view. Art. IX of the Treaty with Udaipur,

[1] British Yearbook of International Law, 1930, p. 55.

dated 13th January 1818 runs as follows:—"The Maharana of Oudeypore shall always be absolute ruler of his own country, and the British jurisdiction shall not be introduced into that principality." The proclamation of war against Coorg dated 15th March 1834 notified that "a British army is about to invade the Coorg territory." Art. IX of the Treaty with Bikaner dated 9-3-1818 states that the "Maharaja and his heirs and successors shall be absolute rulers of their country and the British jurisdiction shall not be introduced into that principality." Under Art. III of the Treaty with the Company shall not interfere with the country of the Maha Rao Raja nor shall demand any tribute from him." Art. IX of the Treaty with Jodhpur dated 6th January 1818 assures that "the Maharajah and his heirs and successors will remain absolute rulers of their own country and the jurisdiction of the British Government shall not be introduced into that principality." Likewise, Art. IX of the Treaty with Bhopal of 1818 states that "the Nawab and his heirs and successors shall remain absolute rulers of their country and jurisdiction of the British government shall not in any manner be introduced into that principality." Art. VIII of the Treaty with Jaipur dated 2nd April 1818 runs as follows:—"The Maharajah and his heirs and successors shall remain absolute rulers of their territory and their dependants according to long-

established usage; and the British civil and criminal jurisdiction shall not be introduced into that principality." In fact Art. VI of the Treaty with the Gaekwar of 8th March 1802 clinches the position:—"For the cultivation and promoting the permanency of the good understanding between the *two states* (italics author's) there shall be a constant good correspondence kept up between them, and agents reciprocally appointed to reside with each." Again in a letter from the Governor of Bombay to H. H. the Gaekwar dated 8-2-1841 one reads that "the British Government in no way wishes to interfere in the internal administration of your Highness' territory, of which it acknowledges you to be the sole sovereign."[2]

Further, in the Treaty with Jammu and Kashmir dated 16th March 1846, it is stated in Art. IX that "The British Government will give its aid to Maharajah Golab Singh in protecting his territories from external enemies." The Instrument of Transfer of Benares State expressly declares that "The Family Domains of the Rajas of Benares.....should be constituted as a *state* under the suzerainty of His Majesty." (Italics mine).

The territory of Indian states is *not British territory.*[3] The certificate which the India Office gave to assist the

[2] Aitchison, Vol. VIII, IV Ed., p. 89.

[3] Vide *Empress* vs. *Keshub Mahajan and others*, 8 C. 985 F.B.

court in assessing the status of the Gaekwar of Baroda as a foreign ruling Prince illumines the position—"The Gaekwar of Baroda has been recognized by the Government of India as a ruling chief governing his own territories under the suzerainty of His Majesty. He is treated as falling within the class referred to in the Interpretation Act 1889, Sec. 18, Sub-Sec. 5, as that of native princes or chiefs under the suzerainty of His Majesty exercised through the Governor-General of India. The British Government does not regard or treat His Highness' territory as being part of British India or His Majesty's dominions, and it does not regard or treat him or his subjects as subjects of His Majesty.

But, though His Highness is thus not independent, he exercises as ruler of his state various attributes of sovereignty, including internal sovereignty which is not derived from British law, but is inherent in the ruling chief of Baroda, subject however to the suzerainty of His Majesty, the King of England....."[4]

In this connection reference may be made to remarks of Lord Halsbury regarding jurisdiction over railway territory of Indian states. In the particular case, their Lordships were of opinion that "The railway territory has never become part of British India, and is still part of

[4] Certificate extracted in *Statham* vs. *Statham* etc., 1912, p. 92.

the dominions of the Nizam. The authority therefore to execute any criminal process must be derived in some way or another from the sovereign of that territory."[5]

As evident from the following extract from a letter of the Marquess of Salisbury to the Marquess of Dufferin, dated April 25th, 1896, "The protected states of India are not annexed to, nor incorporated in the possessions of the Crown. The rulers have the right of internal administration subject to the control of the Protecting Power for the maintenance of peace and order and the suppression of abuses."[6]

The subjects of Indian states are *not British subjects.* In fact, Kashmir has defined its state-nationality by passing a law that no one who has settled in Kashmir after 1886 is considered a hereditary subject of the state. The question of the status of the subjects of Western India Agency was raised in the House of Commons through a question on 19th November 1928 when the Under Secretary of State for India answered that the people of the territories included in the Western India States Agency "are not considered British subjects but owe allegiance to the Rulers of the various states and no question arises therefore of their having rights of representation as

[5] *Muhammad Yusuf-ud-din* v. *Queen Empress* 1897, 27 I. A. 137.

[6] *British and Foreign State Papers*, Vol. 89, p. 1053.

British subjects." It is necessary to restate that the subjects of Indian states are when inside their territory the particular state-subjects and when outside their own territory are British protected persons.

The laws of England do not apply to the state-subjects. The King in Parliament is precluded from legislating for the Indian states. The Secretary of State for India's letter dated 28-9-1927 to the Secretary-General of the League of Nations relating to the ratification of Conventions of the International Labour Organization by Indian states, makes this abundantly clear:—"The exact relations between the various states and the Paramount Power are determined by a series of engagements and by long-established political practice. These relations are by no means identical, but broadly speaking, they have this in common, that those branches of internal administration which might be affected by decisions reached at International Labour Conferences are the concern of the Rulers of the states and are not controlled by the Paramount Power. The legislature of British India, moreover, cannot legislate for the states nor can any matter relating to the affairs of a state form the subject of a question of motion in the Indian Legislature."

Indian states are outside the jurisdiction of British Courts. Within the domain of private international law, these states are to be regarded as "separate political societies

and as possessed of an independent civil, criminal and fiscal jurisdiction."[7] At this stage, the law relating to property in cantonments in Indian states may be briefly examined. Here as elsewhere, the Paramount Power has successfully clutched at jurisdiction. The Paramount Power has expressed that it has "no proprietary right over the soil but that so long as the cantonment is maintained, the land assigned to the cantonment should be under their control as absolutely and completely as if it were part of British territory." The following principles may be justified as applicable to this branch of law:—

(1) *The proprietary and sovereign rights belong to* the state.
(2) Jurisdiction over this area is being exercised by the British officer as a "Political right."
(3) *A fortiori* the right to tax the non-exempted classes in the cantonment areas belongs to the Indian state and not to the Paramount power. Sardar K. M. Panikkar has ably discussed this part of the law with a good deal of inside knowledge.

In 1863, the Ruler of Bhopal protested against the

[7] *Sirdar Gurdayal Singh* vs. *The Raja of Faridkote*, 1894, A. C. 670.

exercise of jurisdiction by the representatives of the British Government over British subjects resident in the principality of Bhopal and relied very properly on Art. 9 of the Bhopal Treaty of 1818 whereby the "jurisdiction of the British Government shall not in any manner be introduced into the principality." An unsuccessful attempt at taking away the jurisdiction of the Court of Travancore in 1871 met with the repudiation of John D. Mayne who put the case of Travancore thus:—"Parliament is as incapable of taking away the powers of a court in Travancore as it is of dealing with the courts of France." The argument can be successfully maintained that the jurisdiction exercised by the representatives of the Paramount Power in cantonment tracts, residency areas and railways is in excess of the grant or cession. The fiscal hardship that can be caused by the growth of big centres of trade in residency bazaars is illustrated by the residency bazaars in Indore which could not have been in any view legally justified under Art. 14 of the Indore Treaty of 1880. The Residency bazaars of Indore and Hyderabad have been however retroceded to the respective states on 14th May 1933.

The principle of state-sovereignty over air has been recognized so far as air sovereignty of Indian states is concerned. This is of course subject to the necessary limitations of international requirements and the para-

mount needs of defence. The Air Navigation Agreement is a striking instance of the new procedure in matters affecting Indian states and the Paramount Power.

Treaties of the Crown with third parties "are not applicable *ipso jure* to the territory of the Indian states but only if in these Treaties, the application to these states is expressly agreed upon."[8] The Crown has itself recognized this aspect of the status of Indian states in notes addressed to third states. As found in a letter of the Marquess of Dufferin, dated April 25th, 1896:—"It has, however, never been contended that if those states had had pre-existing Treaties with Foreign Powers the assumption of Protectorate by Great Britain would have abrogated those Treaties. It could not have had, and in no case, has had, such consequences."[9] Examples are furnished by the Treaties entered into by the state of Jammu and Kashmir with Tibet and China at the time of the Conquest of Ludakh by Maharaja Gulab Singh. These treaties are now enforced through the medium of the Crown.

Rulers of Indian States

It has been stated in books written by distinguished

[8] The writer is indebted to the study of legal results of status of Indian states by Prof. Victor Bruns and Carl Bilfinger.

[9] *British and Foreign State Papers*, Vol. 89, p. 1053.

publicists connected with Indian states that Rulers of Indian states are sovereigns enjoying ex-territoriality. Put in such a form the statement is too wide. The Law of Nations "gives a right to every state to claim so-called ex-territoriality, and therefore, exemption from local jurisdiction, chiefly for its Head, its diplomatic envoys, the men of war and its armed forces abroad."[10] This branch of law has for the first time had in 1938 the benefit of the decision of a Supreme Tribunal in England. Lord Atkin has thus summed up the two distinct immunities appertaining to foreign sovereigns:—

(1) "The courts of country will not implead a foreign sovereign, *i.e.*, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

(2) The second is that they will not by their process whether a sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.

[10] Oppenheim, Vol. I, IV Ed., pp. 280-281. Vide also *Mighell* vs. *Sultan of Jahore*, 1894, I. Q. B., 149.

Hullet v. *King of Spain*, 1828, I. D. and Cl. 174. The *Parlement* Belge. 1878. L.R. 5. P. D. 197. The *Cristina*, 54. 1938. T. L. R. 512.

> There has been some difference in the practice of nations as to possible limitations of this second principle—whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country, it is in my opinion well settled that it applies to both."[11]

So far as Indian states are concerned, it is well established that while travelling abroad, these princes enjoy the status of a foreign ruling prince and are exempt from municipal jurisdiction.[12] But this rule of international law which is based on the principle of "absolute independence of the sovereign to recognize any superior authority" cannot be applied to the Rulers of Indian states since they are subordinate to the authority of the Crown. The rule of international law has been modified by the provisions of Sec. 86 Civil Procedure Code (V of 1908) under which alone the Rulers can claim exemption. Under Sec. 86, a Ruler cannot be sued without "the consent of the Crown Representative" and no execution can be issued against him without such consent. This consent shall not be given unless the Prince has (*a*) instituted a suit in the court against the person desiring to sue

[11] *The Cristina*. 54 (1938) T. L. R. 512 at p. 513.
[12] *Statham* vs. *Statham* etc., 1912, p. 92.

him or (*b*) by himself or another trades within the local limits of the jurisdiction of the court or (*c*) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

It may here be noted that in cases of grave misconduct of a prince, the Crown under its prerogative powers has punished the Rulers. The modern practice is after trial by a Commission consisting of a judicial officer not lower in rank than a High Court Judge and four other persons of high status of whom not less than two will be the ruling princes. As Lord Curzon put it, "in cases of flagrant misdemeanour or crime, the Viceroy retains on behalf of the Paramount Power, the inalienable prerogative of deposition, though it is only with extreme reluctance and after the fullest enquiry and consultation with the Secretary of State that he would decide to exercise it."[13]

Status of Indian States: Legal Theory

Grotius, Pufendorf, and Vattel agree that in unequal alliances the inferior Power remains a sovereign state. Over the disputes and internal dissensions of its subjects, the suzerain power has no jurisdiction as such. Vattel

[13] *Leaves from a Viceroy's Note-book*, Curzon, p. 41.

says that a weak state which in order to provide for its safety places itself under the protection of a more powerful one and engages to perform in return several offices equivalent to that protection without, however, divesting itself of the right of government and sovereignty, does not cease to rank among the sovereigns who acknowledge no other law than the law of nations. The eminent lawyer who appeared as *amicus curiae* in *Lachmi Narain* v. *Raja Pratap Singh*,[14] has summed up the result thus:— "it is clearly recognised by the text-writers on international law that a state may exist *qua* state viz. retain its *Political personality* notwithstanding a very great *"immiintio Imperii"* resulting from its relation with other states."

At this stage it is necessary to distinguish between sovereignty according to political philosophers and sovereignty as necessary requisite *in a legal sense* in any person or body entitled to be called sovereign.[15] Particularly during the last fifty years there have been many conflicting criticisms of the Austinian view. While to political philosophers the term has become overburdened with ambiguity, the legal characteristics of a sovereign

[14] 2. A. i. at p. 3.

[15] The author is grateful to the Rt. Hon'ble Sir T. B. Sapru who expounded his views on legal sovereignty in an illuminating talk to friends on 9-3-40.

individual or body in a state have remained well-recognized. Justice Story defined Sovereignty in its legal sense as "the supreme, absolute uncontrollable power, the *Jus Summi Imperii*, the absolute right to govern."[16] In a legal sense, the sovereign authority is according to Prof. Bryce, "the person (or body) to whose directions the law attributes legal force, the person in whom resides as of right, the ultimate power either of laying down general rules or of issuing isolated rules or commands whose authority is that of law itself."[17] In a recent Madras Case it fell to be decided whether a particular *Samasthenam* was in any sense a sovereign state. Reilly J. laid the following tests of sovereignty in a legal sense:—

"Any state which has preserved any degree of sovereignty—and various attributes of sovereignty may have been ceded to their suzerains by different states—must have at least three characteristics:—

(1) The people of the territory concerned must owe allegiance to the ruler of the supposed state and in the term 'ruler' I include any person in whom or body in which the sovereign power resides.

[16] *Chirokee Nation* vs. *Kansas* R. R. *Co.*, 33 Fed. Rep. 900.
[17] Bryce, *Studies in History and Jurisprudence*, Vol. II, p. 51.

(2) The Laws enforced in the state must be the ruler's laws, either made or recognized by him, not laws imposed by any outside authority, nor laws made by him in virtue only of a delegated authority.

(3) Those laws must be enforced by his courts, *i.e.*, courts deriving their authority from him and not subject to the judicial control of any outside authority."[18]

The case in R. *V. Christian*[19] is also relevant. The court held that high treason can be committed against a state which possesses internal sovereignty even though its external powers may be restricted to some extent, and that South Africa did possess sufficient internal sovereignty in South-West Africa to sustain the charge. Innes C. J. made the observation "that curtailment of external sovereignty and dependence upon another power are not in themselves fatal to the sovereignty of the state concerned." Further the "distinction between internal and external sovereignty is inherent and of the two, the internal is the more important for a law making and law-enforcing authority is essential to the very existence of a

[18] *Kothavenkata Rami Reddy* vs. *Sri Maharaja Seetha Rama Bhupal Rao and Others*, 53 M. 968 at 974.

[19] 1924 S. A. L. R. (A. D.) 101. Also for a discussion of the case, *Transactions of the Grotius Society*, London, Vol. 23, p. 89.

state." Or again, as was observed in the same case by De Villiers, J. A. "The limitation of the exercise of sovereign rights in certain directions does not deprive the sovereign of *majestas*, so long as there is no abdication of sovereignty in favour of another." The bearing of these observations on the sovereign status of Indian states is direct.

In his celebrated Minute in the Kathiawar Case (1864) Sir Henry Maine has argued out the position of divisibility of sovereignty. There is not anything in international law to prevent "some of the sovereign rights being lodged with one possessor and some with another."

One of the eminent officials admitted to a full knowledge of the relations between the Governor-General and these states, Sir Charles Tupper, was responsible for the theory of Feudal relationship between the suzerain and the feudatory princes. But this theory though assiduously developed to cover the minority administrations in Indian states is not found quite satisfactory even by authoritative witnesses like Sir William Lee Warner and Sir Sydney Low. "It is the superficial resemblance confined to a very few of the petty chiefs, which makes the employment of the phrase 'feudatory' so dangerous to the rights of the great bulk of the pro-

tected princes of India."[20] No doubt, the fifteen chiefs in the Central Provinces to whom adoption *sanads* were granted in 1865, executed an agreement which commenced as follows:—

"I am a chieftain under the administration of the Chief Commissioner of Central Provinces. I have now been recognized by the British Government as a feudatory subject to the political control of the Chief Commissioner or of such officer as he may direct me to subordinate myself to."[21] First adopted by Lord Ellenborough the term "feudatory" was used loosely by Canning. From Disraeli's days to 1876 the feudal analogy was picturesquely extended. Historical basis for such a theory is plainly non-existent. King Edward VII's coronation message is addressed to "feudatories." King George V's Proclamation of 1911 contains also the term "feudatories". From 1911 onwards, in royal messages the phrase "Princes of India" occurs. Indeed certain states of Kathiawar, Bundelkhand, and Simla Hills are feudatories. The chiefs of Mahikanta Agency and Southern Maharatta Jagirdars were no more than officials of the Peshwa.

According to Sir W. Lee Warner, "no uniform or

[20] Lee Warner, *Native States of India*, II Ed., p. 394.
[21] Aitchison, IV Ed., Vol. I, pp. 445 ff.

consistent practice has been observed by the Paramount Power in describing the states as a whole. On the contrary different language has been used in despatches and in treaties at different periods and even in the same period one ruler has been distinguished from another, each case being treated on its own merits."[22] Scindhia and Holkar as also Alwar and Bhopal could lay claim to the title of independent and sovereign states when they came into contact with Britain. (Vide Art. IV, Treaty with Gwalior, 1804: Treaty of 1806 with Indore; Treaty of 1818 with Bhopal; Treaty of 1803 with Alwar). From 1766-1799 the status of Hyderabad was that of an equal power with whom the East India Company made a treaty of "alliance and friendship."[23] (Vide Treaty with the Nizam dated 12-11-1766). Though Sir W. Lee Warner admitted generally the internal sovereignty of Indian States, he was responsible for a view which was later fully developed by imperialistic Curzon and Lord Reading who was stressing the 'hard fact' in his letter to H. E. H. the Nizam (1926). According to Lee Warner "treaties and grants held by the protected princes and precedents of British Government's dealings with them and with the protected princes who hold no

[22] Lee Warner, *The Native States of India*, II Ed., pp. 387-388.
[23] Aitchison, Vol. IX, p. 22. (IV Ed.)

treaties or grants must be read as a whole, like the decisions of English courts of justice."

Prof. Westlake, the eminent international lawyer, held that "the imperial right over the protected states appears to present a peculiar case of conquest, operating by assumption and acquiescence."[24] In Statute 39 and 40 Vict. C. 46 these states were described as "several princes and states in India in alliance with Her Majesty." The doctrine of paramountcy developed by Prof. Westlake has got added weight by its adoption by the Indian States' Committee. "There is a paramount power in the British Crown of which the extent is wisely left undefined. There is a subordination in the native states which is understood but not explained." Prof. Westlake also illustrates from the Proclamation of 13th January 1875 for trial of the then Gaekwar of Baroda. The imperial doctrine has been so developed that "the position of all the native princes is to be ascertained from the principles latest adopted in dealing with any of them, as the position of all vendors and purchasers of property, or of all drawers and endorsers of bills of exchange is to be ascertained from the latest decisions with regard to any of them."[25]

[24] Westlake, *Collected Papers*, p. 214.
[25] Westlake, *Collected Papers*, p. 222.

In the Manipur case (1891) the trial and punishment for breach of the conditions of loyalty were extended to the subjects of a Native State, one of whom had indeed usurped the throne. The growth of the *modus vivendi* has been "gradual like that of the Indian Empire itself, that its particulars have in the same manner been imperceptibly shifted from an international to an imperial basis; and that the process has been veiled by the prudence of statesmen, the conservatism of lawyers, and the prevalence of certain theories about sovereignty."[26] Westlake regarded the rules which regulated the status of Indian states as part of the constitutional law of the Empire.

Prof. Pollock observed that in cases of doubtful interpretation, the analogy of international law might be found useful and persuasive.[27] Long ago Phillimore had stated that the principles of international justice are "binding, for instance on Great Britain in her intercourse with the native powers of India."[28]

Prof. Hall's view is found in a footnote[29] where it is laid down that "the Indian Native states are theoretically in possession of internal sovereignty and their

[26] Ibid, p. 232.
[27] *Law Quarterly*, XXVII, pp. 88, 89.
[28] Phillimore, *International Law*, Vol. I, p. 23.
[29] Hall, *International Law*, VI Ed., p. 27.

relations to the British Empire are in all cases more or less defined by treaty." When Prof. Hall follows this up by stating that in matters not provided for by treaty a "residuary jurisdiction" on the part of the Imperial Government is considered to exist, his view becomes open to strong criticism and appears unsupportable from an examination of treaties.

Sir Leslie Scott and four other eminent counsel engaged by the princes stated as their opinion that "as each state was originally independent so each remains independent except to the extent to which any part of the ruler's sovereignty has been transferred to the Crown. To the extent of such transfer, the sovereignty of the state becomes vested in the Crown: while all sovereign rights, privileges, and dignities not so transferred remain vested in the ruler of the state." In their view the state and not the Crown has residuary jurisdiction. In fact the pronouncements of the Crown themselves had recognized the sovereignty of the states. The sanads issued after the Mutiny refer to "Governments of several Princes and Chiefs who now govern their own territories." The Proclamation of 19th April, 1875 states that the Gaekwar is deposed from the "sovereignty" of Baroda. The Montagu-Chelmsford Report stressed the "independence of the states in matters of internal administration."

The Indian States' Committee held that the states are "*sui generis*, that there is no parallel to their position in history, that they are governed by a body of convention and usage not quite like anything in the world. They fall outside both international and municipal law." The points of agreement between the Indian States' Committee and the opinion of Sir Leslie Scott deserve to be noted:—

(*a*) The relationship of the states to the Paramount Power is a relationship to the Crown.
(*b*) The treaties made with them are treaties made with the Crown.
(*c*) Those treaties are of continuing and binding force as between the states which made them and the Crown.
(*d*) It is not correct to say that 'the treaties with the Native states must be read as a whole.' There are only 40 states with treaties but the term in the context covers "engagements and sanads."
(*e*) Cases affecting individual states should be considered with reference to those states individually, their treaty rights, their history and local circumstances and traditions and general necessities of the case as bearing upon them.

The opinion of two distinguished German Profes-

sors, Dr. Viktor Bruns and Dr. Carl Bilfinger (available through the courtesy of Sir Mirza Ismail) is that "the Paramount Power of the British Crown is not incompatible with the independent status of the Indian states as international persons. States which are under the paramountcy of another state remain independent international persons so long as they are not incorporated in the other state."

The eminent Indian Jurist, Sir P. S. Sivaswamy Aiyar has described the status of the Indian states thus:— "The precise category to be assigned to the Indian states in international law is to the academic lawyer as fascinating as it is baffling. The fact is that for various purposes including the administration of justice, the Indian states are treated as foreign territory beyond the jurisdiction of British Indian Courts. They are in other respects subject to the suzerainty of the British Government with all its practical implications and corollaries. The body of law applicable to them can at best be spoken of only as quasi-international law."[30]

So far as the Government of India Act (1935) is concerned, Sec. 311 defines an Indian State following the English Interpretation Act of 1889 (Sec. 18) thus:—

[30] From the Foreword of Sir P. S. Sivaswamy Iyar to Dr. Mehta's valuable work on *Lord Hastings and Indian States*, p. vii.

"Indian state" includes any territory, whether described as a state, an estate, a Jagir or otherwise, belonging to or under the suzerainty of His Majesty and not being part of British India. It is significant that the term "alliance" familiar to readers of earlier Acts of Parliament, is not found in the Government of India Act 1935. The word found instead—to describe the nexus between the Crown and the states is 'relationship.' (Vide Sec. 3). As Prof J. H. Morgan pointed out the new term "relationship" may excite "doubt but it cannot provoke dispute." The term 'sovereignty' with reference to the status of the Indian states which occurs in the Instrument of Instructions and the Instrument of Accession (Draft) appears only once in the Act in another context to describe the authority of His Exalted Highness the Nizam over the Berar (Sec. 47). Further, the term used in connection with accession is "instrument" and not "treaty." The validity of instruments of accession to be executed by the Indian states, as distinct from their scope and interpretation by the Federal Court cannot be subject to question in court since under Sec. 6 (9) "all courts shall take judicial notice of every such instrument and acceptance."

Is the term "*suzerainty*" correct to describe the relations between the crown and the different classes of Indian states? What is meant by *suzerainty*? The term

has been examined in courts of law which in the main have followed the definitions of text-book writers of International Law. While construing the definition of the 'Indian state' in the English Interpretation Act of 1889, Bargrave Deane, J. has pointed out that "suzerainty is a term applied to certain international relations between two sovereign states whereby one, whilst retaining a more or less limited sovereignty acknowledges the supremacy of the other. Such a relation may be either in the nature of a fief or conventional, i.e., by some treaty of peace or alliance in contrast with the fief, which is a sovereignty granted by a lord paramount over some defined territory accompanied with an express grant of jurisdiction."[31]

According to Prof. Westlake, the word "suzerainty," is used in the Treaty of Berlin to express the relation of the sublime *Porte* to the principality of Bulgaria, which it created. That was the proper term in the Middle Ages for relation of a feudal superior to his vassal, while 'sovereignty' was more properly superiority in jurisdiction, the highest court in a territory which was distinct for judicial purposes being called a *Cour Souveraine*. A modern description of a state as subject to a suzerainty

[31] *Statham* v. *Statham and H. H. the Gaekwar of Baroda*, 1912, p. 92 at pp. 95-96.

does not by itself shut it out from any of the rights that were enjoyed by the state of the Holy Roman Empire, which were internationally accepted as sovereign states, and were so called, while they recognized the Empire as their suzerain power. How many of these rights it is intended that the state in question shall enjoy must be ascertained from the more detailed provisions of its constitution.[32]

Prof. Hall formulates that "a state under the suzerainty of another being confessedly part of another state, has those rights only which have been expressly granted to it, and the assumption of larger powers of external action than those which have been distinctly conceded to it is an act of rebellion against the sovereign."[33]

Wheaton gives the examples of the principalities of Moldavia, Wallachia, and Serbia, under the *suzerainete* of the Ottoman *Porte* and the protectorate of Russia, as defined by the successive treaties between these two powers, confirmed by the Treaty of Adrianople, 1829.

Fiore defines a treaty of *suzerainty* as one concluded between a civilized and an uncivilized state in which the former imposes on the latter (which accepts it) every

[32] Westlake, '*Collected Papers*', p. 90.
[33] Hall, International Law, VI Ed., p. 29.

obligation of mediate and immediate dependency in the exercise of its rights of sovereignty within the state.

According to Oppenheim, modern *suzerainty* only involves a few rights of suzerain state over the vassal state which can be called constitutional rights. The rights of the suzerain over the vassal states are principally international rights of whatever they may consist. *Suzerainty* is by no means sovereignty. Suzerainty is a kind of international guardianship, since the vassal state is either absolutely or mainly represented internationally by the suzerain state. This is the position of the Indian vassal states of Great Britain which have no international relations."[34]

An examination of the above definitions by text-writers leads to the conclusion that having regard to its various applications in practice, the term "suzerain," "would scarcely seem to imply any definite relation in law."[35]

Though its legal implications appear to lack precision, the following political characteristics of "*suzerainty*" pointed out by Sirdar D. K. Sen flow out of the definitions of the eminent international text-writers:—

[34] Oppenheim, V. Ed., Vol. I, p. 165.
[35] Pitt-Cobbett *"Leading Cases in International Law,"* Vol. I, p. 55, V. Ed.

(*a*) "The *suzerain* state is under an obligation to protect the vassal state.

(*b*) The vassal state is under an obligation to observe the following conditions:—

(*i*) It must be loyal and faithful to the suzerain: *fiducia*.

(*ii*) It must render service in time of war: *servitium*.

(*iii*) The title of the vassal state is not original, it is derived from the suzerain state.

(*iv*) In almost all cases, the vassal state pays tribute to the *suzerain*.

(*v*) In all its external affairs, the vassal state is governed and guided by its *suzerain*."[36]

The implication that the title of the vassal state is derived from the suzerain state is manifestly inapplicable to states like Travancore, Kashmir, Gwalior, Hyderabad and Baroda. But in cases of conquest retrocession or regrant, this implication is applicable. These Indian states have a status which is *quasi-international* in character. Looked at internationally from "the outside by foreign powers, they are British. Looked at however from within they are not British. Parliament which has full

[36] D. K. Sen, *Indian States*, pp. 36-37.

legislative power over all British territory cannot legislate for the Indian states."[37]

The amendment of the definition of "Indian State" in Sec. 311 of the Government of India Act, (1935) is significant. The deletion of the term "*suzerainty*" may satisfy the hypersensitive states, but the shifting of the status to depend purely on "recognition by His Majesty" reduces all states to one level. It is presumed that this simplified definition will not disturb the existing relationship of suzerainty as between certain states and their subordinate Jagirs. The amended definition in the Act runs as follows:—

"Indian state" means any territory, not being part of British India, which His Majesty recognises as being such a state, whether described as a state, an estate, a Jagir or otherwise.

[37] *British Year Book of International Law*, 1930, pp. 55-56.

CHAPTER IV

THE POLITICAL AGENT

"From the beginning the duties and functions of the Resident or minor political officer made him an unique diplomatic official." His ancestor was the commercial Resident of the East India Company. Though the political officers of the Government of India have not been "able to shake off the influence of their commercial origins," an order was passed in 1789 which prevented the Residents at foreign courts from any concern in commercial transactions. The relations of Warren Hastings with Oudh demonstrate that the Residents were interfering all round, not omitting such intriguing details as horses in the Nawab's stable and the dishes to be cooked in the Vizier's kitchen!

The Political Department expanded in the spacious days of Lord Wellesley. A young recruit to the Department who later was to prove so successful an administrator, Montstuart Elphinstone, has given us rare insight into the nature of work of the political officer. Intelligence work, reporting situation of native Raja's armies and palace intrigues, performing military duties—

all these formed part of his work.[1] As Prof. M. Ruthnaswamy put it he was "more and less than an ambassador." That he was not an ambassador but an agent of the Government of India is clear from Wellesley's rebuke to Malcolm *vis-a-vis* the relation between Gwalior and Gohed:—"Mr. Malcolm's duty is to obey my orders and to enforce my instructions—I will look after the public interests."[2]

The first officers of the Political Department were military men. Lord Wellesley turned to the Civil Servants of the Company for recruitment. In 1873 military officers were to be certified as to "their conciliatory manner towards the native soldiery and the people of the country. They were also required to pass an examination in Wheaton's *International Law* and Aitchison's *Treaties* and in the Persian language."[3]

When the policy of the East India Company was changed to one of subordinate cooperation by Lord Hastings down to the Great Indian Mutiny (1858), "the

[1] This writer is indebted to the valuable contribution made by Prof. M. Ruthnaswamy in his comprehensive study of *British Administrative System in India* vide also Letters in *Life of M. Elphinstone, Vol. I* and *Life and Correspondence of C. Metcalfe*, Vol. I.

[2] *Life and Correspondence of Sir John Malcolm*—by J. W. Kaye. Letter to Malcolm. 22—1804.

[3] Ruthnaswamy, *British Administrative System in India*, p. 498. Also vide Appendix to Report of the Select Committee on East India Finance, 1873, Vol. III.

resident ministers of the Company at Indian Courts were slowly but effectively transformed from diplomatic agents representing a foreign power into executive and controlling officers of a superior Government." (K. M. Panikkar). A political officer as Col. John Munro held the two inconsistent posts of Resident and Dewan at Travancore (1815-25). In 1814 the Marquis of Hastings wrote in his Private Journal:—"In our Treaties with them (the Princes of India) we recognize them as independent sovereigns. Then we send a Resident to their courts. Instead of acting in the character of ambassador, he assumes the functions of a dictator; interferes in all their private concerns, countenances refractory subjects against them and makes the most ostentatious exhibitions of his exercise of authority." Chandu Lal during his administration in Hyderabad took his orders from the Resident only. Col. Macaulay, no wonder wrote thus to the Raja of Cochin:—"The Resident will be glad to learn that on his arrival near Cochin, the Raja will find it convenient to wait upon him."[4]

The Prince of Wales (in 1875) was also struck with the "rude and rough manner of these English political officers."[5]

[4] *Cochin State Manual*, p. 138.

[5] Prince of Wales' Letter to Queen Victoria, 1875. Vide, *King Edward* VII. *Sydney Lee*, Vol. II, p. 365.

The duties of Residents varied with the "nature of engagements between the British Government and Indian States. They were the organs of communication between the Government of India and the Rulers of native states. They conducted negotiations, reported all important occurrences at the native courts and kept the supreme government informed of the resources, character, and administration of the princes to whom they were accredited. They offered advice and sometimes help to those princes in matters both of internal and external concern. And when requested they arbitrated differences between them and their subjects and neighbours."[6]

The old bullying tone has been substituted generally by a salutary change in recent times. The system is characterised by "secrecy, secret despatches, mysterious communications, order and regulations which nobody can understand, which vary from state to state or from moment to moment in each state."[7] The apprehensions of the Princes about the activities of this unique officer are expressive:—"with the help of the misinterpretation of a phrase "subordinate cooperation," the political agent has become the repository of almost unique powers.

[6] M. Ruthnaswamy. *British Administrative System in India*, p. 490.

[7] Rt. Hon'ble V. S. S. Sastry's Cochin Speech, extracted in Chudgar. *Indian Princes under British Protection*, pp. 122-123.

He is a judicial officer entrusted with the enforcement of law against Europeans in all states and against British Indians in some. He is the sole channel of communication with the Government of India whose deputy he is in all matters. He also enjoys ex-territoriality, freedom from customs, special personal honours, etc. He also represents the Government of India in an executive capacity. The combination of such diverse authority makes the Residents of Indian States specially prone to interpret the obligations of "subordinate cooperation" of states as meaning compliance without question with any wish they may express."[8]

The variety of duties of political officers was so immense that it lent "colour and even the spice of danger to a political officer's career. At one moment, to follow the picturesque description of brilliant Curzon, grinding in the offices of the Foreign Department, at another the political officer may be required to stiffen the administration of a backward native state, at a third he may be presiding over a Jirga of unruly tribesmen on the frontier, at a fourth he may be demarcating boundaries amid the wilds of Tibet or the sands of Seistan."[9]

[8] The British Crown and the Indian States, pp. 111-112. (Chamber of Princes).

[9] Lord Curzon's Speech at the United Service Club, Simla 30th Sept. 1903. Collected Speeches, Vol. IV.

When the Political Agent interposed between the Ruler of a state and his subjects, it was always resented. The chancellor of the Chamber of Princes put it thus in his speech to the Butler Committee :—

"The Ruler and his administration are regarded as under the orders of the Political Officer.....The Princes of India frankly recognize the right of the Crown under the treaty relationship to assert its authority for the correction of gross injustice or flagrant misrule. But we are clearly of opinion that such an obligation does not confer a right upon the agents of the Government of India to interfere at their own discretion with the internal administration of the states."[10]

If the ruler be away from his territory either on grounds of health or "inspired by the pursuit of knowledge or by a thirst for civilisation" or otherwise, the intervention of the political officer is made more frequently. The late Sir Sayaji Rao Gaekwar, one of the foremost progressive Indian Princes put the results of such needless intervention thus:—"Uncertainty and want of confidence in the indigenous government is promoted. The influence of the Raja, which is indispensable for the individuality of the state is thereby impaired. The ruler being discouraged slackens his in-

[10] *The Indian Prince in Council*, K. M. Panikkar, pp. 151-152.

terest in the continuity of his own policy."[11]

During the minority of the rulers of states or in times of regency, "the Resident or other political officer played a dominant part in the administration of the states." Till the evolution of the equitable policy in 1917 of administering the states as trustees during minority regimes, precious rights of Rulers as coinage rights, rights of indigenous manufacture of salt, and sovereign rights over railway territories have been either surrendered or lost during minority administrations.

[11] *My Way and Days*—by Sayaji Rao Gaekwar, XIX Century Feb. 1901.

CHAPTER V

RELATIONS VIS-A-VIS THE PARAMOUNT POWER

External Affairs

For international purposes, "state-territory is in the same position as British territory and state-subjects are in the same position as British subjects." Surrendering foreigners in accordance with the extradition treaties of the Paramount Power, cooperation with the Paramount Power to fulfil its obligations of neutrality, assistance to enforce the duties of the Paramount Power in relation to suppression of slave trade, duty not to injure any subjects of a foreign power within its territory—all these obligations are to be respected by the states.

An examination of treaties, engagements and sanads brings out "the right and the obligation to protect the Indian states against external and internal aggression and dangers." The two eminent German jurists Dr. Victor Bruns and Dr. Carl Bilfinger are quite correct when they deduce that the Paramount Power have the right and duty "to conduct the foreign relations of Indian states with

third states but also to determine what such relations shall be."[1] The treaties entered into by the state of Jammu and Kashmir with Tibet and China at the time of the conquest of Ludakh by Maharaja Gulab Singh are now enforced through the medium of the British Crown.

Extradition

The law relating to extradition from and to Indian states is governed by many extradition treaties with Indian states. The extradition treaty with Hyderabad, dated 8-5-1887 as also the treaty with "Ulwar" (Alwar) dated 26-8-1867 along with the supplementary agreement of 1887 may be taken as typical.[2] Rules made under Sec. 22 of the Indian Extradition Act (XV of 1903) regulate the procedure of political agents for surrender of accused persons to Indian states. The obligation to extradite foreign criminals is a type of duty which flows from the junction of the royal prerogative and Acts of Parliament. "With the sanction of Parliament, the crown has agreed to surrender certain fugitive accused persons to Austria, Belgium, Brazil, Denmark, France, Germany,

[1] From the Memorandum by the German Professors made available for study through the courtesy of Sir Mirza Ismail.

[2] Aitchison, Vol. III, IV Edition. For Extradition Treaties as between foreign countries. Piggott. *Extradition*. Appendix II.

and other nations."[3] These treaties have been published in the Gazette of India and if the accused finds shelter in an Indian state, "that state is bound to surrender him to the British authorities without any express engagement on that behalf." Sir W. Lee Warner also states that the source of this obligation is the connexion of the Indian State "with the British Government and its delegation to the Government of all rights of negation." There is point in the criticism by Prof. Westlake of the use of the term 'delegation,' for the source of this obligation is "the absence of any *persona standi* towards the foreign state, which should make negotiation by or on behalf of the native state possible."[4]

With reference to the law of extradition between the Paramount Power *vis-a-vis* the India state, Mr. K. M. Panikkar points out certain difficulties which deserve careful attention. It was only after long correspondence that the Government agreed "that the extradition of persons other than British subjects may be granted from railway lands for all cases of offences and merely those enumerated in or specified by the Governor-General-in-Council under the schedule of the Indian Extradition Act of 1903 as applied to these lands for which alone the

[3] Lee Warner. *The Protected Princes of India*, p. 189.
[4] Westlake. *"Collected Papers"*, p. 629.

extradition of British subjects will usually be granted."

Thus, with many states there are extradition treaties which govern the surrender of criminals. A *prima facie* case has to be established and *British India* or the Indian State concerned surrenders the criminal to the jurisdiction of the *delicto loci*. This may appear on the face of it an equitable arrangement, but in fact it is not so. It has been claimed that the *prima facie* evidence which British Indian authorities should submit is for the satisfaction not of the state but of the political officer. As Col. Newmarch wrote to the Gwalior Durbar, "If I consider the *prima facie* evidence sufficient, that opinion should be enough to justify the extradition and trial of accused persons by a British Court."

A few of the other difficulties which have been experienced in regard to the extant extradition relation between the Indian states and the Government of India may also be mentioned here:—

(*i*) The provisions of Secs. 8A and 15 of India Act XV of 1903 leave it entirely to the discretion of the Local Governments to decline to surrender offenders in spite of a warrant having been duly issued by the Political Agent.

(*ii*) Distinction is made for purposes of the surrender of deserters from Imperial Service Troops and the military forces of states.

(*iii*) The British Indian Government often demand surrender of persons accused of offences which they themselves do not treat as extraditable for purposes of surrender to Indian states.

Generally put, the actual position is that in regard to the major states which have no treaty of extradition, arrangements are on the basis of reciprocity but that principle is subject to the right claimed by the Crown as Paramount Power to demand the surrender of any class of criminals and the right to refuse extradition in cases referred to in Rules 3 and 5 of the Extradition Rules framed under Sec. 22, Indian Extradition Act.[5].

Obligations in Regard to Defence

The Paramount Power is responsible for the defence of both British India and the Indian states and as such has the final voice, in all matters connected with defence, including establishments, war materials, communications etc. It follows that "the Paramount Power should have means of securing what is necessary for *strategical purposes* (Italics mine) in regard to roads, railways, aviation, posts, telegraphs, telephones, and wireless, cantonments, forts, passage of troops, and the supply of arms and ammunitions" (Butler Committee).

[5] Gazette of India, 1904, Part I, p. 364.

An examination of treaties reinforces the liability of the Paramount Power to "protect the persons of their rulers or to suppress rebellion or otherwise to maintain the internal tranquillity of the states."[6] Complaints have been made by some Rulers that when they appealed for protection it has either been denied to them or only provided at their own expense. E.g., The treaty of 1818 with Indore bound the British Government in return for certain cessions of tribute and territory "to support a field force to maintain the internal tranquillity of the territories of Mulhar Rao Holkar and to defend them from foreign enemies;" but in 1836 when a pretender to the throne attacked the ruling Maharaja, the assistance of the British forces was refused. Scindia whose treaties include similar engagements, was denied help in reducing rebellious subjects both in 1824 and 1830. Strenuous argument has been made on behalf of the Princes that there is no obligation upon the states to pay for Defences apart from such as arise out of their treaties, engagements or sanads.

With regard to interstatal relations, the states cannot cede, sell, exchange or part with their territories to other states without the approval of the

[6] *The British Crown and the Indian States*, p. 149. (Chamber of Princes.)

Paramount Power.

Means of Communication

Particularly for strategic purposes and economic good of India as a whole railways have been constructed in India. A few instances will serve to illustrate that paramount considerations of strategy or other extraneous points of view have weighed with the Paramount Power rather than the interests of the state concerned. The Gwalior Durbar provided 75 lakhs of rupees for the section of the Railway line from Gwalior to Agra, less than half of which lies in Gwalior territory and supplied not only the necessary land but also materials for the construction of the line free of charge.

The Nizam was persuaded to build the line from Purna to Hingoli which was to form a link in a strategic through line from north to south but when fifty miles had been built it was found necessary to change the alignment and even the gauge of the north and south line and the Nizam was left with a piece of railway leading nowhere, which yields 2 or 3 per cent on the money which was invested in it.

The Holkar State Railway was built out of a loan of a crore of rupees at $4\frac{1}{2}\%$ from the Indore Durbar, and the terms granted to the prince were unusually favourable as half of the profits are paid to him although no allow-

ance is made in calculating them for the additional traffic which it brings to the main line.

It has been very correctly pleaded that the British Government cannot claim the generous cooperation of the states in building railways for the sake of developing and uniting the whole country and at the same time "regard the states' share in the development as a benefit which they had no right to expect and for which they must unquestionably pay whatever price may be asked."

Posts and Telegraphs

In 15 states the Durbars also provide Post-offices. Five of them—Gwalior, Chamba, Jind, Nabha, Patiala—have conventions with the Imperial Post Office and work in cooperation with it. In the rest—Hyderabad, Cochin, Travancore, Jaipur, Charkhari, Junagad, Kishangarh, Mewar, Shahpurs, Orchha, the greater part of correspondence is carried by local post offices, while branches of Imperial Post Offices carry correspondence across state frontiers. In Gwalior, imperial post offices exist only on territory which is British for purposes of jurisdiction such as Railway stations and the residency area and Gwalior postage stamps are valid for correspondence to any part of India but not overseas. Except in these fifteen states, the Imperial Post Office enjoys a complete monopoly of the postal services. Even before the ad-

vent of the British, Mysore, Cochin and Travancore had an indigenous postal system. The privilege of the right to receive free service stamps for their official correspondence is enjoyed by 27 states.[7] There are six states—Bhawalpur, Banganapalle, Bhopal, Mysore, Pudukkottai and Rewa—whose official correspondence is carried free of charge by the Government of India, Postal Department.

Currency and Mints

Being one of the cherished privileges of sovereignty, the right of coinage was given up with great reluctance by many Princes. Hyderabad, Udaipur, and Jaipur still coin their own rupees and make their own pice. Hyderabad alone possesses a paper currency which produces considerable profit. The Davidson Committee evaluated this Hyderabad claim at Rs. 17 lakhs a year.

Customs and Tariffs

Regarding customs revenue levied on goods consumed in the states, these duties operate in fact as transit duties. These cover such articles as sugar, mineral oil, cotton yarn, cotton piecegoods, matches, manufactured goods other than cotton or silk, etc. The state's view

[7] Vide Appendix VII, Sch. B, Davidson Committee Report.

would be that they would be entitled to 22.5% of the revenue in some of the articles, 18%, 15% and 10% of the revenue in others respectively. The states would be ready to cooperate in any policy which will benefit Indian industry, provided their own wishes and interests as consumers and producers are given due weight when policy is being decided.

Sea Customs

It has to be remembered that the "customs rights of the Kathiawar and other states are, with very few exceptions, not the creation of any Treaty or Agreement, but exist by virtue of the state's own sovereignty. They are rights cherished not only because of their financial importance but because they are the outward symbol of much that the states greatly prize. Indeed in many instances the very existence of a state may be said to be bound up with its port."[8] The Joint Parliamentary Committee Report enunciated the general principle thus: The maritime states which have a right to levy sea customs "should be allowed to retain only so much of the customs duties which they collect as is properly attributable to dutiable goods consumed in their own state."[9]

[8] Davidson Committee Report. Para 380.
[9] The J. P. C. Report. Para 265.

Comparatively simpler has been the problem of Cochin and Travancore regarding the customs duties collected at the Cochin port. This has been satisfactorily settled through agreement between Cochin, Travancore, and Government of India, as they were in effect "commercial rights susceptible of adjustment on a commercial basis" agreeable to parties concerned.

Salt Immunity

It is historically correct to state that salt has been taxed in India from time immemorial. The East India Company resorted "to the cumbrous device of establishing invertebrate cordons which sprawled across thousands of miles and involved an enormous expenditure... ...The huge impenetrable hedge of thorny trees, evil plants, stone walls and ditches through which no man or beast could pass without being stifled or scorched, must have proved a formidable barrier to circulation of trade and industry and was a visible symbol of the great gulf which yawned between two parts of India. The Government of India wisely purchased the great Sambhar lake from Indian states in 1869-70 and the primitive device of an unending cordon was consigned to the limbo of oblivion. Agreements were made with nearly 50 states and uniformity was introduced in the complicated mass

of petty administrations."[10] In Kathiawar and Cutch the arrangements were made on a Paramountcy basis and instances are not wanting where officials had resorted to compulsion. The states wanted the Davidson Committee to revise their Salt agreements but they declined to do so on the ground that except "in the special cases of Kathiawar and Cutch," "all salt agreements were negotiated with states which in the last resort possessed the full right to reject the terms offered."[11]

Cash Contributions

As one state after another entered the British system of alliances "they were required to contribute money or to cede territory for the maintenance of troops officered and disciplined by the Company's military establishment."[12] Only 212 states make regular cash payments as tributes. They are both "arbitrary and unequal in their incidence on individual states." As between federal units, such payments have no logical basis and the Davidson Committee recommended the abolition of such contributions. The term "cash contribution" occurring in Sec. 147 (Government of India Act, 1935) is founded on

[10] *Federal Finance.* (Shri Sayaji Rao Lectures. 1939). Sir Shafaat Ahmad Khan, p. 40.

[11] Davidson Committee, para 215.

[12] *Davidson Committee Report,* para 23.

the classification of such contributions drawn up by the Davidson Committee:—These are divided into seven classes which however are not mutually exclusive:—

1. Periodical contributions in acknowledgment of suzerainty including contributions payable in connection with any arrangement for aid and protection. E.g., subsidies payable by Bundi, Jaipur, Sirohi, Udaipur, Kotah, Cochin in part, Mysore and Porbandar.
2. Contributions in commutation of any obligation to provide military assistance to His Majesty. E.g., subsidies payable by Bhopal, Indore, Jaora, Dewas fall under the category.
3. Contributions in respect of the maintenance by His Majesty of special force in connection with a state, e.g., subsidies payable by Cochin (in respect of the expense of one battalion of native infantry under Art. 2 of the Treaty of 1809) and Travancore. (Under art. 3 of the Treaty of 1805).
4. Contributions in respect to the maintenance of (*a*) local military force or Police (amounts payable by Jodhpur, Kotah, Tonk, Udaipur, Indore and certain other Central India Agency States.) (*b*) or in respect of the expenses of an

Agent (Kolhapur).

5. Contributions fixed on the creation or restoration of a state or on a re-grant or increase of territory (including annual payments for grants of land on perpetual tenure or for equalisation of the value of exchanged territory).

   E.g., subsidies payable by Jhalawar, Lawa, Ajaigarh, Bihat, Charkhari, Panna, Indore, Cutch, Bhawanagar, Manipur, Cooch Behar, Benares, and certain states in the Punjab.

6. Contributions originally paid to another state, but subsequently acquired by the British Government.

   (*a*) by conquest or lapse of the original recipient.

   E.g., contributions paid by equivalent of the 'peshcash' and 'nazrana' agreed in 1764 to be paid to Nawab of Carnatic and lapsed to British Government—Shahpurs in Rajputana, and certain other states in Central India, Bombay, Behar and Orissa Agencies.

7. By assignment from the original recipient, e.g., certain assignment of contributions by Baroda, Gwalior, Indore and Dhar states of inter-state

tributes to the Crown.[13]

Federal Finance Contemplated

Sec. 147 (Government of India Act 1935) has embodied the essential part of "the scheme of federal finance *quo ad* the Indian states"[14] carrying out the recommendations of the Indian States Enquiry Committee (Financial) (called the Davidson Committee). This committee recommended that the payments made by the general body of states should disappear at least *pari passu* with the contributions in the form of taxes on income from the Princes to the Federal Government:—

1. That fluctuating tributes should be stabilised at their present figures and that the conditions attached to certain other tributes already remitted should be removed or relaxed.
2. That the securities representing the amounts paid for capitalised tributes should be returned *pari passu* with the remission of annual payments.
3. That immediate relief should be given by the remission of the amount of any contribution which

[13] Vide *Davidson Committee.* App. III, Sch. A and B.
[14] N. Rajagopala Iyenger. *Govt. of India Act*, 1935, p. 183.

is in excess of 5 per cent of the total revenues of the state which pays it.

4. That remaining payments should disappear at least *pari passu* with the income-tax contributions from the Provinces but that a moiety should be extinguished at the latest in ten years from federation and the whole within twenty years.

If the states accede to federation, a provision is proposed in the Act based on the recommendations of the Davidson Committee to work out a system of debits and credits. The monetary value of the privileges and immunities enjoyed by the states is to be regarded as being on the 'debit' side. An 'immunity' may be explained "in non-technical language as an economic privilege enjoyed by a state by reason of any treaty or arrangement or by virtue of its sovereign rights, which operates to adversely affect sources of federal revenue, which is capable of monetary evaluation."[15] The identification of 'ceded territory' presented a problem of great complexity but it has been solved by the strenuous efforts of Mr. V. Narahari Rao of the Foreign Department and his identification has been agreed to by the

[15] N. R. Iyengar. *The Government of India Act*, 1935, pp. 183-184.

states affected. The Davidson Committee has given money value for the several ceded territories. Cash contributions, tributes or military cessions of territories for defence by the states are to be counted as on the credit side.

'Privileges and Immunities'

Include the following:—

i. Advantages and rights in respect of Sea Customs and salt enjoyed by the states.
ii. Sums receivable for surrendering the right to levy internal customs, duties, etc.
iii. Postal privileges.
iv. Currency privileges etc.

Where debits are greater than the credits, no further payment is to be made by the states to the Crown or the Federation; but where the credits are greater than debits, the difference will be remitted to the state concerned by the Federal Government and this remission will be spread over a period of not less than twenty years. The arrangement thus arrived at will be stated in the Instrument of Accession of each state.[16]

[16] The writer is indebted to Prof. B. P. Adarkar of the Allahabad University whose conspicuous knowledge of Federal Finance has been available for consultation to the author.

CHAPTER VI

INTERNAL ADMINISTRATION

At every point of study of the status of Indian states, one finds legal ideas or jural concepts made inapplicable owing to the inroads made by the tantacles of paramountcy or by more subtle applications of the doctrine of Act of state "defying jural analysis." Prof. Hall has made an astounding observation in a footnote[1] that in matters not provided for by treaty, a "residuary jurisdiction on the part of the Imperial Government is considered to exist." Lee Warner has also developed the theory of a 'residuary jurisdiction' of the British Government in all matters. The shadows and repercussions of Paramountcy which is undefined permeate everywhere. The argument ably developed by Sir Leslie Scott was that "the Crown has no sovereignty over any state by virtue of the prerogative or any source other than cession from the ruler of the state." This argument gets added support from the Preamble to the Foreign Jurisdiction Act, 1890. The extra-territorial jurisdic-

[1] Hall, "*International Law*," VI Ed., p. 27.

tion exercised by the British Crown within the territories of foreign states is founded upon "Treaty, Capitulation, grant, usage, sufferance and other lawful means." If the stand were to be taken on consent, it may be expressed in various ways. Per Dr. Lushington in the *Laconia*,[2] consent may be expressed by

(*a*) "Constant usage permitted and acquiesced in by the authorities of the state;

(*b*) active consent; or

(*c*) silent acquiescence where there must be full knowledge." Such facts as are available are sufficient to torpedo fully any acquiescence by the states.[3]

Further, in law Paramountcy cannot be a source of the extra-territorial jurisdiction of the Crown. As Piggott has tersely put it, "the exact position involved in ex-territoriality may be shortly stated thus: Such powers alone as are surrendered by the sovereign of the country can be exercised by the sovereign of the treaty Power—(viz. The sovereign to whom the grant has been made); as those powers which are not

[2] 2 Moo. P. C. N. S. 183.

[3] Vide Chapter III for the instances of Bhopal Protest of 1863 and the Travancore Repudiation of 1871.

surrendered are retained."[4]

Joseph Chailley's classification of the Rulers of Indian states into three classes is still juridically correct since in the atmosphere of a federation-to-come, the Princes "were always preoccupied with the theory of Paramountcy, their own Treaty-rights, and the economic grievances under which they had been labouring for a long time."[5] Joseph Chailley's classification already indicated ran thus:—

(1) "The very few who govern according to European ideas of order and justice and who seem to take a personal interest in the welfare of the people.

(2) Those who have introduced the elements of a reformed organization, have enacted laws, have appointed judges and have then appointed a Wazir to govern for them and relieve them of responsibility.

(3) Those who still imagine that they are the state, that its resources are private property, that its inhabitants are their slaves, and that their chief business is pleasure."

Though the number of states introducing reforms has increased, the basis of division is still sound.

[4] *Piggott: Ex-territoriality*, pp. 18-21. The reader is referred to the able examination of this topic in D. K. Sen's "Indian States."

[5] Raghubir Sinh: *Indian States*, 1938, p. 196.

It is necessary to have a correct idea of the constitutional steps taken by different states to associate the people in the administration of the country. The states which have impressed the author with their constitutional progress and which are here examined have to be taken as illustrative and not exhaustive. The political consciousness in the southern states as Mysore, Travancore, and Cochin, is at a high level thanks to the prevalence of civilized and efficient administration.

Mysore

Mysore, a model state in many respects has had the rare advantage of being pilotted by a galaxy of able and tactful Dewans. Though the constitution of local municipal committees goes back to 1862, the Representative Assembly was inaugurated in 1881, as a first step in the direction of ensuring that the "actions of the government should be brought into greater harmony with the wishes and interests of the people." This was carried a step further in 1907 when the Legislative Council was constituted to associate in the "actual process of the making of laws and regulations non-official gentlemen qualified by practical experience and knowledge of local conditions and requirements."

It is interesting to note that this proposal of 1907

was looked upon by the Government of India "with qualified enthusiasm." In conveying their approval to the proposal, the Paramount Power made it clear that "whatever the legislative machinery employed, the ultimate responsibility for all legislation in Mysore remained absolutely with His Highness the Maharaja and that the control over such legislation vested in the Governor-General in Council by the Instrument of Transfer of 1881 was unimpaired."[6]

The question of constitutional developments in Mysore was examined by a committee presided over by Sir Brajendra Nath Seal in 1923 and important reforms were introduced on the recommendations of that Committee. The approval of the Government of India had to be obtained in conformity with the provisions of the Mysore Treaty.

Mysore Reforms of 1939

A special committee which was later enlarged to 26 members was appointed in April 1938 to examine the development and working of representative bodies in the state and to formulate proposals as to the further changes which may be desirable in order to secure the

[6] Extracted in the Mysore Reforms Report of the Committee, 1939, p. 22.

constitutional progress of the state. Five members of this Committee belonging to the Mysore Congress dissociated themselves from the work of the Committee from January 17, 1939.

Through a Proclamation dated 6th November 1939, H. H. the Maharaja of Mysore inaugurated the Reforms following mostly the recommendations of the Committee. The Government have not followed the Committee's recommendation regarding the necessity for a declaration of the *goal of reforms*. The reasons stated for such a decision are not very convincing.

The Proclamation in its preamble rightly states that "further steps (are taken) to increase the association of the representatives of my people with my government in the administration of the state." The Reforms Committee follows the dictum laid down by Sir B. Seal when they lay down that "all power, jurisdiction and authority in Mysore are as a matter of fact derived from the Maharaja and are exercised in his name, and a scheme of constitutional reform could, therefore, only be introduced by means of a devolution of powers from the Maharaja."

The Mysore constitution has been set on a track with special characteristics. Any theoretical scheme to introduce at once responsible government under the aegis of the Maharaja would be "too sudden a break with the past." Thus the two Houses do not corres-

pond with the two chambers of a bicameral legislature. They are not "strictly coordinate, but supplement each other's functions."

The Mysore Representative Assembly is to be reconstituted to consist of 310 members. The term of the Representative Assembly as also of the Legislative Council is to be extended to four years. The powers of the Assembly extend to consultation on bills. Even when the principles of a bill are opposed by a majority of "not less than two-thirds of the total strength of the Assembly," the verdict of the House should only *ordinarily* (italics mine) be accepted by the Government. It is when one reaches the subsequent stages of legislation that the functions of the Representative Assembly dwindle to their plight of helplessness: after a bill is passed by the Assembly, "it may be introduced in the Legislative Council with or without the modifications proposed by the Assembly, and that, when the bill is finally passed by the Council, it need not be placed again before the Assembly but may be submitted to His Highness the Maharaja for assent together with a statement of the opinions expressed by the Assembly thereon." Emergency legislation without consulting the Assembly is given a life of two six months' periods. The Assembly as also the Council can discuss that part of the military forces of His Highness (excepting Palace Troops).

The Legislative Council gets an elected majority; out of the reconstituted 68 members 44 will be elected. The Legislative Council is to have a non-official President elected by the House, subject to the approval of His Highness the Maharaja, after the first term when he will be nominated. There is to be also an elected Deputy President subject to the approval of His Highness. A vote of no-confidence with a majority of not less than "two-thirds of the total strength of the House" can remove a President or Deputy President.

Separate Electorates

"The unanimous desire of the Muslims has led to the retrograde adoption of separate electorates for Muslims." Poorest argument is found in this paragraph, for the government has taken a reactionary step violating the prior practice at Mysore and splitting the body politic. The fond hope of the government that "the system will not retard the growth of a sense of common citizenship" is against the lessons of British Indian experience. The Indian Christians are also given this safe isolation and cutting away from the cementing links of common citizenship. An excellent opportunity to give a lead to British India has been lost by the talented and tactful Dewan.

Mysore's New Executive

The statesmanly advice of Sir Shanmukham to have the honour of the first elected Minister in an Indian state has had a sympathetic echo in Mysore though it is a bit already overdue in progressive Travancore. Mysore is to have two Ministers chosen from the elected representatives out of an executive consisting of the Dewan and "four ministers; and no Minister will be under any disability to hold any portfolio on the ground of being non-official." The dyarchical system is not copied in the sense of a division of responsibility for the administration of "transferred" and "reserved" subjects.

The provisions regarding privileges of members of the two Houses are really progressive. Mysore is enjoying *de facto* the fundamental rights of citizenship; the recommendations of the Committee to have a declaration of fundamental rights have been smothered with a kind remark that "it is unnecessary." When they exist *de facto*, where is the valid objection to have them *de jure*?

The first class artistic administrator in the Dewan of Mysore is not a believer in the crisp dictum of Campbell Bannerman that good government is no substitute for self-government. According to him and the Committee there should not be "too sudden a break with the existing system." Progress has to be genuine and secure

and the Mysore constitution must continue to develop "by natural process determined by reason and reality." A favourite maxim of Sir Mirza Ismail is that *haste does not always make speed.* Mysore which has had a high degree of political consciousness unlike the North Indian states could have the Minto-Morley Reforms in 1939! The Mysore constitution vouchsafed for under the Reforms of 1939 has been made in the mould of a benevolent autocrat.

Travancore

The Legislative Council in progressive Travancore was brought into existence in 1888, the ruler's right of direct legislation independently of the council remaining unimpaired. The first council had a minimum of five members and a maximum of eight of whom no less than two were non-officials. The non-officials were nominated by Government. The council was purely a deliberative body for purposes of legislation and had no administrative functions. But it had plenary powers of legislation subject to the ruler's assent before a measure could pass into law. In introducing any measure affecting the public revenues of the state or by which any charge was imposed on such revenues, the member introducing it had to obtain the previous sanction of the Dewan.

In 1898, the council was enlarged, the minimum

number of members being eight and miximum fifteen, the proportion of non-officials being fixed at 2/5 of the total number. The council was not allowed to entertain any measure affecting the Royal family or relations with the Paramount Power.

The state council was again remodelled in 1919. Provision was made for granting the people the right of electing members to the council while reserving to the government the right of nominating some members to the Council. In 1921, it was again enlarged. After Regulation II of 1108 M.E. (1932-33) the Sri Chitra State Council consists of 37 members, 22 of whom are elected and out of 15 nominated 10 are officials. The Dewan is the President of the Council. A panel of Chairmen is also nominated.

The Sri Mulam Popular Assembly constituted in October 1904 consists of 72 members of whom 62 are non-officials and 10 officials. 14 of the non-officials are nominated. The Dewan is the President; but a Deputy President elected by the Assembly is empowered to preside at meetings in the absence of the President. A panel of Chairmen is also nominated.

Both Houses are empowered to initiate and pass legislation, to discuss the budget, to ask questions and move resolutions. The Assembly has a larger measure of control over finance than the Council.

There is a well-developed system of judiciary with the State High Court at the head.

Baroda

Among the five most progressive Indian states, Baroda has stood foremost, alike for its enlightened administration and its eminent Dewans. Rightly has the long reign of Sir Sayaji Rao III been called "the Golden Age of Baroda's history" by his worthy grandson who has solemnly stated in his Proclamation of 20th February 1939, that he would approach the "high responsibilities of his position as the first servant of the state."

Baroda had inaugurated the Dhara Sabha in 1908. The power of making laws in the premier state of Baroda is one of the prerogatives of the Maharaja who was assisted till February 1st 1940 in this important task both by the ministers and by the Legislative Council on many important occasions. The *Varisht* or High Court is the highest court in the state in all judicial matters. Provision has been made for appeals against its decisions to the *Huzur Nyaya Sabha* (corresponding to the Privy Council). The state has carried out the separation of executive and judicial functions. Primary education is free and compulsory in the state. There

is also a network of district, village, and travelling libraries. There are in the State one central Library, 46 town libraries, 1017 village libraries and 276 travelling libraries.

A committee was appointed to consider the question of the enlargement of the Dhara Sabha and connected questions by H. H. the Maharaja Pratapsinh Gaekwar. The recommendations of the committee have been reinforced through the Government of Baroda Act VI of 1940. Very properly, the "right and prerogative of His Highness to make laws is reserved." (Sec. 4).

The Executive Council of the State shall consist of the Dewan and three other members, (*vide* the Proclamation dated 1st February, 1940) one of whom shall be "chosen from among the non-official members of the Dhara Sabha." This non-official member shall hold office for the life of the Dhara Sabha—three years. This is a noteworthy landmark like Sir Shanmukham's dyarchy experiment in Cochin.

The Dhara Sabha

A slight alteration of the recommendation of the Committee has been made by raising the total number of members from 55 to 60. Wisely has the Baroda Durbar, under the incorruptible administration of Sir V. T. Krishnamachariar, decided in favour of general consti-

tuencies. The Government have also decided properly that all urban areas except Baroda city should vote along with the Mahals in which they are situated. The official members including the Dewan-President will be 9; 14 are to be nominated and 37 are to be elected, thus ensuring a decided *elected majority*.

The Deputy President after three years shall be a member of the Dhara Sabha elected by the Dhara Sabha. Two Parliamentary Secretaries shall be appointed by His Highness from among the non-official members of the Dhara Sabha.

S. 17 of Baroda Act VI of 1940 gives the topics excluded out of the purview of the Dhara Sabha. Questions affecting His Highness' army, His Highness' household, His Highness' relations and treaties with other States, and the regulation of the borrowing of money have to be necessarily excluded. There is *ex abundanti cautela* in cl. 8, regarding "any other matter which may be determined from time to time by His Highness."

It is a moot question whether the 'Legal Remembrancer' should be a member of the *Nyaya Sabha* (*vide* S. 46 (*b*)). In a constitution where the source of legal authority is the Maharaja, interpretation has to vest in the Executive Council of His Highness, guarding at the same time the inherent prerogatives of the Ruler.

The new Constitution rightly emphasises the "identi-

ty of interests" between the Ruler and his subjects. Baroda is bound to serve as a beacon light to many of the Indian States living in different degrees of medievalism. One may assuredly look forward to further devolutions of power on representatives of the people when this experiment proves a success.

Cochin

The experiment of associating one elected Minister in a form of dyarchy with the Dewan at the head has taken Cochin legitimately to a high level of constitutional development. The Dewan is assisted by a Secretariat and a Civil Service. The Legislative Council inaugurated in 1925 now consists of 58 members of whom 38 are elected,[7] 12 are officials and Heads of Departments, and 8 are nominated by the Ruler to represent minorities. It is of interest to note here that the Paramount Power's attitude towards constitutional reforms in Indian States was not the same in 1912 as it is now after the declaration of Earl Winterton in the House of Commons. Sir Albion Banerji, an eminent ex-Indian administrator disclosed this information in a discussion on the paper by Sir Shanmukham Chetty under the auspices of the East India Association, London, on 18-10-

[7] Government of Cochin Act, S. 13 (17-6-1938).

1938. When Sir A. R. Banerji as Diwan of Cochin submitted in 1912 a Scheme for the establishment of an Advisory Council in Cochin, with a majority of nearly 2 to 1 of elected members, the Ruler of Cochin who had administered the State with great success for 25 years had to listen to the advice of the Paramount Power couched in the following terms:—"My Government are unable to think that His Highness has fully realised to what extent the powers of the Darbar (with which those of the Dewan are inseparably identified) will suffer by this very definite detraction from them or how far the integrity of those powers, which His Highness holds in trust for his successors and which is the very basis of his Treaty obligations to the Paramount Power, will thereby be endangered."[8]

Under §24 of the Government of Cochin Act, the Cochin Legislative Council is precluded from deliberating on the following among other topics:—

(*a*) Ruling Family of Cochin.
(*b*) Relations of the Ruler with the Crown or with foreign Princes and States.
(*c*) Matters governed by the Treaties with the

[8] *Journal of the East India Association*, Jan. 1939, p. 32. Also from the kind letter of Sir Albion Bannerjee to the present writer, dated 23rd March, 1939.

Crown.

(*d*) Military forces of the State.

(*e*) Conduct of the Judges of the High Court in discharging their official duties.

(*f*) Matters relating to the management of temples in the control of His Highness and a few other minor matters.

(*g*) Extradition of criminals.

The Dewan is ex-officio President and in his absence a Deputy President who is elected by the Council presides over the meetings.

Under the Cochin Constitution of June 1938, the Ruler has entrusted the administration of certain departments to a minister chosen by the Ruler from amongst the elected members of the Legislative Council.[9] The Minister is responsible to the Council for his action. The Minister is in charge of agriculture, cooperation, development of cottage industries, public health, administration of panchayats, and uplift of the depressed classes.

At the head of the judicial administration in the State is the High Court. Subordinate to it, there are District Courts and Munsiff's Courts to exercise Civil jurisdiction. Criminal jurisdiction is exercised and

[9] *Papers connected with the New Constitution of Cochin*, p. 2.

controlled by Sessions Courts and sub-magistrate's courts. Litigation up to a value of Rs. 50 is decided in village punchayat courts.

Jammu and Kashmir

The Praja Sabha consists of 75 members, 59 of whom hold office for three years and the remaining 16, designated State Councillors, are summoned by His Highness for a period of 4½ years. There is a large non-official majority in the Sabha, 33 of whom are elected from, and 14 are nominated to represent the different communities in the State on a territorial basis. By a Proclamation dated 11th February, 1939, 7 more seats were thrown open to election by certain important interests. As a result, there will be 40 elective and 30 non-elective seats. An office of Deputy President has also been created for the Praja Sabha, to be filled by election by the members of the Sabha. Provision is made in para. 13 of this Proclamation for the appointment of Praja Sabha Under-Secretaries to be attached to the Ministers and whose work will be confined to matters for discussion in the Sabha, whether Bills, Resolutions or Questions. It was also directed by the Proclamation that the proposals of the Council of Ministers for the appropriation of the revenues and other monies in any year for expenditure on items which are votable be submitted to the vote

of the Sabha in the form of demands. But the Council of Ministers shall have power "in relation to any such demand to act as if it had been assented to notwithstanding the withholding of such assent or the reduction of the amount of any demand, if the Council considers that the expenditure proposed by it is necessary for the carrying on of any department or for the discharge of the Council's responsibility for its administration."

It was also directed that "in modification of the existing provisions, legislation regarding taxes, as distinguished from fees and penalties, should in future, subject to the safeguards relating to the initiation of, or previous consent to such legislation, be passed by the Praja Sabha —instead of as now by the Council of Ministers after merely placing it before the Sabha and taking into consideration the resolutions passed by it therein."[10]

The subjects that have been reserved from the jurisdiction of the Praja Sabha are:—

(*a*) Matters regarding the Ruler, his family and their household,

(*b*) Relations between the State and the Paramount Power or with Foreign Powers or the Government of any State in India,

[10] Proclamation of H. H. the Maharaja Bahadur of Jammu and Kashmir, dated 11-2-1939, para. 16.

(*c*) Matters concerning the Gilgit and Ladakh frontiers,

(*d*) Rights specifically granted to the Jagirdars by their Sanads,

(*e*) Organization, discipline and control of the State army,

(*f*) State Departments dealing with Ceremonial, State Garage, Palace Guards, State Stables, Palaces, Reception and *Shikarkhana*,

(*g*) *Dharmarth* Department.[11]

HYDERABAD

The biggest of the States, Hyderabad, had its Legislative Council established in 1893. It originally consisted of the Chief Justice, a Puisne Judge of the High Court, the Inspector General of Revenue, the Director of Public Instruction, the Inspector General of Police and the Financial Secretary. Its present strength is 20. Of these seven are non-officials; two are elected by the jagirdars and landowners, two by the pleaders of the High Court and the other three are nominated from among the subjects of the State. A State Executive Council was created in 1919 whose President is also the President of the Legislative Council. In 1921, the Nizam

[11] *Vide* S. 7, Regulation 1 of 1991, Jammu and Kashmir.

issued an extraordinary *Jarida* ordering the complete separation of the judicial from the executive functions, and establishing a High Court of Judicature with an appellate jurisdiction.

A Reforms Committee was constituted in September, 1937 with Dewan Bahadur S. Aravamudu Iyengar, the eminent lawyer of Hyderabad as President. The long-awaited Government Order on Reforms was released to the Press on July 20, 1939. The constitutional position of the Ruler has been left in its old 'autocratic' character. The Ruler is according to the Government Order, "both the supreme head of the State and an embodiment of the people's sovereignty." An unicameral legislature has been recommended. The Legislative Assembly is to consist of 85 members, of whom 42 shall be elected; 28 shall be nominated, of whom 14 will be officials and 14 non-officials; 3 shall represent Crown lands and 5 the principal landed estates. A progressive feature in these Reforms is the inauguration of joint electorates and the rejection of the demand for separate electorates.

Unlike the other constitutions in Mysore, Travancore, Cochin, Gwalior or Kashmir, the subjects of legislation have been divided into four lists by the Reforms Committee. The first list comprises subjects where the Assembly would have the power of initiating legislation

without the previous permission of the Government. An examination of this list indicates that all departments of national development are included in it. The second list includes subjects as Criminal Law and Procedure, Welfare of Labour, etc. Herein the initiation of legislation is subject to the previous permission of Government. The inclusion of Local Self-Government, Agricultural lands and forests in this list is in no sense a progressive feature. The third list includes subjects as the Public Services, Osmania University, Imports and Exports, Railways, Posts and Telegraphs, Air-navigation, Taxes other than local taxes. The fourth list of subjects can be called the expressly excluded list. It has been left to His Exalted Highness' Government to add the following to the usual list of Reserved Subjects in progressive Indian States as Mysore, Travancore, and Cochin:—Currency, coinage, and legal tender. The Government of India Act, 1935, clumsy and difficult as it is, had need for only three lists, but it has been left to the premier State of Hyderabad to evolve a fourfold classification.

A debatable feature is that the Muslims who constitute a small minority of the population are to be given equal representation with the Hindus both among the elected and nominated members.

Territorial constituencies have been ruled out, and

instead, occupational constituencies based on the economic *motif* are envisaged. The arguments of the able Chairman of the Reforms Committee in favour of functional representation are masterly and this interesting experiment in the premier State of Hyderabad deserves careful study of publicists and constitutional laywers.

Gwalior

On June 14th, 1939, His Highness the Maharaja of Gwalior announced in a Proclamation that his "subjects are entitled to the fundamental rights of good citizens"—*viz.: Liberty of speech and of the press, liberty of conscience*, and liberty of association "subject to the limitations and duties laid down by law for the maintenance of peace and order." The Majlis-i-Am and the Majlis-i-Kanoon shall be replaced by the Praja Sabha and the Samant Sabha, each of which enjoying three years. The Praja Sabha is to be enlarged to a membership of 85 out of whom 50 members will be duly elected and 35 members, including but not exceeding 15 officials would be nominated. A Franchise Committee is to be appointed and the method of election to both the Houses shall be direct. The Samant Sabha or Upper House shall be 40, 20 elected and the rest nominated including officials not exceeding 12.

The lower house is entrusted with the powers of

interpellation, passing resolutions, initiating legislation and discussing the main heads of the State budget. The following topics are excluded from the purview of legislation:—

(*a*) The Ruler, his family, the household and the privy purse.
(*b*) Foreign and Political affairs.
(*c*) Army including its budget.
(*d*) Ecclesiastical Affairs.
(*e*) The Constitution.

The inherent powers of the Ruler are preserved:—

(*a*) Ruler's power of amendment, suspension and repeal of the Constitution.
(*b*) Power of Veto.
(*c*) Power of Emergency Legislation.
(*d*) Power of Certification.

Legislation initiated in the Praja Sabha will not become law unless approved by the Samant Sabha and unless it ultimately receives the assent of the Ruler. Legislation initiated in the Samant Sabha will become law if assented to and in the form assented to by the Ruler. This is certainly an undemocratic feature in the Constitution.

AUNDH

The Aundh State Constitution Act 1 of 1939 is unique in many respects. It is a Swadeshi Constitution *in excelcis*. In Article 2, the principles of "non-violence and public morality" are given a controlling place. It is striking that the residuary power or preservation of prerogative powers of the Ruler is not reserved to the Ruler but all "right authority and jurisdiction heretobefore belonging to Shree Raja Saheb which appertain or incidental to the Government of Aundh State are exercisable by him in such a manner as may be provided by or under this Act or as may be directed by the Legislature in matters for which no provision is made hereunder."

The Legislative Assembly shall consist of 15 members and the Presidents of the Taluka Council will be ex-officio members of the Legislative Assembly. The Presidents of all village and town Panchayats situated within a Taluka shall together constitute the Taluka Council and will elect the President of the Taluka Council. The State Legislature is to consist of Shrimant Raja Saheb and the Legislative Assembly. The Legislative Assembly shall be "the supreme authority in the State and will pass such laws and rules as are necessary for the good government of the State. It will exercise supreme con-

trol over the revenues of the State." (Art. 9). All Bills shall be passed by a majority of members of the Legislative Assembly present and voting and shall become law only on receiving the assent of Shrimant Raja Saheb. (Art. 15). Shrimant Raja Saheb can withhold his consent only thrice. The ministry of three shall be nominated by Shrimant Raja Saheb from amongst the members of the Legislative Assembly and the ministry is responsible to the Legislative Assembly.

The Panchayat Justice, it is significant, shall be free of charge. (Art. 20). The High Court Judge and the Chief Auditor shall be appointed by Shrimant Raja Saheb. Art. 24 puts in bold characters that "Shrimant Raja Saheb is the first servant and the bearer of conscience of the people of Aundh."

The other special powers reserved to the Ruler are—

1. Relations with the P.P. and other States.
2. Right of summoning an extraordinary Session of the Legislative Assembly.
3. Subject to ratification by the Legislative Assembly, the Ruler can promulgate regulations for maintenance of peace and order.
4. Power of suspending the Government.
5. Right of cancelling the election of member of the Panchayat or Legislative Assembly within

one month from the date of election.

Another salutary feature is that all disputes regarding the interpretation of any of the provisions of this Act shall be decided by the High Court whose judgment "shall be final." (Art. 28).

This is a striking illustration of a Swaraj constitution taking its mainsprings of activity from the Panchayats at the villages. The constitution is remarkable in the irreducible minimum of powers reserved to the Ruler. It is an omission that the prerogative of mercy is not found vested in the Ruler; nor does one find the power of dissolution of the Legislative Assembly in an emergency. A few more residuary clauses would be necessary to incorporate these and save the other prerogatives of the Ruler and it is expected that the Raja Saheb will incorporate these.

INDORE

A Constitutional Reforms Committee was appointed on 23rd March 1939 to "report on what lines local self-government should develop in the state and in what manner the constitution of the Legislative Council should be revised and reformed so as to secure increasing association of the people with the administrative machinery with due regard to local conditions and the re-

quirements and circumstances of the State."

His Highness the Maharaja of Indore passed orders on the report of the Reforms Committee on 25th March 1940 giving effect to the following reforms. The Legislative Council shall be enlarged so as to consist of 50 members with a majority of elected members, 34 elected and 16 nominated. Of the latter, 8 will be officials including two ministers and 8 non-officials including representatives of Harijans and Labour. The President of the Council shall be appointed by His Highness. The Deputy President shall be elected by the House.

The Legislative Council shall have the right of interpellations, passing of bills, resolutions and motions and discussion of the Budget. In the subjects excluded from the purview of the Legislative Council are the following:—

1. The Ruling family of the state.
2. The Relations of the Ruler with the Paramount Power or with any foreign Prince or state.
3. Matters governed by treaties, conventions or agreements.
4. The Army.
5. The constitution of the State.
6. The Civil List.
7. Such other matters as may be excluded by His

Highness from the cognizance of the Council.

The Indore Order contains the maximum number of reservations among State constitutions. There is also a residuary clause of exclusion to cover future contingencies.

The Reformed Constitution will be re-examined after six years. On the successful working of the reformed constitution depends the appointment of a minister from among the elected members.

Two Committees on Franchise and Rules and Standing Orders have been appointed.

The Indore constitution has been framed with exhaustive precautions to narrow down the orbit of discussion in the Legislature and safeguard fully the inherent powers and privileges of the Ruler.

Orissa States

It is doubly unfortunate that the Rulers of the 26 Orissa States should have declined to cooperate with the Orissa States Enquiry Committee consisting of Sri Hari Krishna Mahtab and two others. The findings of this Committee would have received added strength if the evidence on the people's side had been tested by the Governments. The theft of important evidence collected in the Dhenkanal and Keonjhar files has created a

prima facie bad impression on the administration of the two States.

With the above observations, it is necessary to appraise the valuable material collected in the Orissa Enquiry Committee Report. "Civil liberties are non-existent in these States. It is only recently that a few States like Mayurbhunj and Nilgiri have allowed the people to exercise partial civil liberty in the form of public meetings and *praja-mandals*" (p. 14). Another intriguing observation which has to be cleared by these States is found in the Report:—"Besides the sums earmarked in the State Budgets for the 'domestic department' there are various other devices which the Rulers and their advisers have found out by which a good portion of public money is diverted to the private treasury of the Raja."[12]

Forced labour to the State in the form of *Bethi* comes in for well-deserved criticism. A peasant is found "spending over one hundred days of the year in doing forced labour for the States or its officials."[13]

So far as the recommendations of the Committee are concerned, a strong case has been made for ensuring the minimum of civilized administration long ago stres-

[12] *Orissa States Enquiry Committee Report*, p. 10.
[13] Ibid. p. 15.

sed in the Irwin Memorandum of 1927 and reiterated now by Mahatma Gandhi. The Committee in sheer disgust at the uncivilized administration in the Orissa States (excluding Mayurbhunj and the Nilgiris) recommend "cancellation of the sanads granted to the Rulers of the States" and treating them "as landlords of permanently settled estates."

If these Orissa States would not bestir themselves immediately to ensure the minimum of civilised administration in their States, any amount of argument based on sanads could hardly be supported either by canons of interpretation of these sanads (which had been revised in 1937) or on grounds of high policy. The Orissa States have been too much in the lime-light recently. The exodus of about 27,000 people from Talchar, the troop movements in Dhenkanal, the rising at Ranpur, and tragic events at Gangpur—all these incidents have clearly demonstrated the medieval administration in these petty States.

CHAPTER VII

PARAMOUNTCY

Before passing on to the Indian States' Committee's view of Paramountcy, it is necessary to state the doctrine of Paramountcy as visualised by the eminent international lawyer, Prof. Westlake, whose views have been followed with deference by the Indian States' Committee. Sir W. Lee Warner wrote thus of it:—

"There is a paramount power in the British Crown of which the extent is wisely left undefined. There is a subordination in the Indian States which is understood but not explained. The Paramount Power intervenes on grounds of general policy, where the interests of the Indian people or the safety of the British Power are at stake. Irrespective of those features of sovereign right which Indian States have for the most part ceded or circumscribed by treaty, there are certainly some of which they have been silently but effectually deprived." On this authoritative statement, Prof. Westlake commented that "a paramount power such as this is defined by being, wisely or not, left undefined. That to which no limits

are set is unlimited. It is a power in India like that of the Parliament in the United Kingdom, restrained in its exercise by considerations of morality and expediency, but not bounded by another political power meeting it at any frontier line, whether of territories or of affairs."[1] The Indian States' Committee would not improve upon this but stated that "Paramountcy must remain paramount; it must fulfil its obligations defining or adapting itself according to the shifting necessities of the time and the progressive development of the States."

Basis of Paramountcy

According to the Indian States' Committee, Paramountcy is based upon "treaties, engagements, and sanads supplemented by usage and sufferance and by decisions of the Government of India and the Secretary of State embodied in political practice." It was advanced by Sir Leslie Scott that "mere usage cannot vary the treaties or agreements between the States and the Crown" for no "agreement can underlie usage unless both the contracting parties intend to make one." It was also argued that usage is *per se* "sterile" in municipal law since it creates neither rights nor obligations. If by usage was meant practice commonly followed by

[1] Westlake, *Collected Papers*, p. 212.

independent nations, it was answered that Indian States are protected by the Crown. No usage in an international law sense can emerge as by the very terms of the basic agreement with the Crown, the Indian States "have given up the rights of diplomatic negotiation with and of war against or pressure upon other Indian States, and have entrusted to the Crown the regulation of their external relations in return for the Crown's guarantee that it will maintain in their integrity their constitutional rights, privileges and dignities, their territory and their throne." Political practice, Sir Leslie Scott stated, "as such has no binding force, still less individual precedents or rulings of the Government of India." From a legal point of view, the efficacy of sufferance is no greater than usage. Though the Indian States' Committee dissented from these views of the eminent counsel, admittedly they "did not examine the legal position at any length." The basis of this *imperial right* is essentially political and any effort at reconstructing these legal-cum-political bases will always remain vulnerable. The Princes who were still pressing for a definition of Paramountcy were authoritatively answered thus by the Secretary of State for India in the House of Commons:—"In the ultimate analysis, however, the Crown's relationship with the States is not merely one of contract, and so there must remain in the hands of the Viceroy an element of dis-

cretion in his dealings with the States. No successful attempt could be made to define exactly the right of the Crown's Representative to intervene."[2]

The Indian States' Committee on the Activities of the Paramount Power—The activities of the Paramount Power are concerned with the following departments:—

"I. *External Affairs*—For international purposes, State territory is in the same position as British territory and State—subjects are in the same position as British subjects." Surrendering foreigners in accordance with the Extradition Treaties of the Paramount Power, co-operation with the Paramount Power to fulfil its obligations of neutrality, assistance to enforce the duties of the Paramount Power in relation to suppression of slave trade, duty not to injure any subject of a foreign power within its territory—all these obligations are to be respected by the States.

II. *Interstatal Relations*—With regard to interstatal relations the States cannot cede, sell, exchange or part with their territories to other States without the approval of the Paramount Power.

III. *Defence of India*—The Paramount Power is responsible for the defence of both British India and the Indian States and as such has the final voice, in all matters

[2] House of Commons Debates, 20th March, 1935, p. 1236.

connected with defence, including establishments, war-materials, communications, etc. It follows that "the Paramount Power should have means of securing what is necessary for *strategical purposes* (italics mine) in regard to roads, railways, aviation, posts, telegraphs, telephones, and wireless, cantonments, forts, passage of troops, and the supply of arms and ammunitions."

IV. *Occasions of Intervention*—Intervention for the benefit of the Prince, for benefit of the State, and for benefit of India as a whole has been claimed as a right of the Paramount Power. Intervention for the benefit of the Prince included recognition of succession by the Paramount Power since 1917, in case of natural heir, an exchange of formal communication between the Prince and the Crown representative is sufficient. The Paramount Power has the right to decide cases of disputed succession. Adoption of an heir requires the consent of the Paramount Power.

Intervention for "settlement and pacification" has had a laboured support by Sir. H. S. Maine in his famous Kathiawar Minute of 1864. It is essentially political as the doctrine of Balance of Power.

Intervention for the economic good of India as a whole has had a mixed reception in Indian States.

Paramount Power and Minority Administrations in Indian States

Problems relating to the Indian States cannot be satisfactorily discussed with reference to purely juristic criteria. An examination of the policy of the Paramount Power when directing the minority administrations of Indian States serves at once to test the case through legal principles and note the tantacles of paramountcy invading subtly realms of internal autonomy.

Legal Theory

The opinion expressed by the eminent counsel of the Princes before the Butler Committee is a correct restatement of the law governing a trustee and a beneficiary. In paragraph 6(*j*) they state thus:—

"Wherever for any reason the Crown is in charge of the administration of a State or in control of any interests or property of a State, its position is, we think, in a true sense, a fiduciary one. That a trustee must not make a profit out of his trust—[3]that a guardian in his dealings with his ward must act disinterestedly, are legal commonplaces and afford a reliable analogy to the relationship between the Paramount Power

[3] Vide 55 (1), Indian Trusts Act (II of 1882).

and the States."

Evolution of Policy

The surrendering of the right of coinage during the minority regimes in Bikaner and Alwar could not be justified on equitable grounds since a guardian or a trustee would be guilty of breach of trust if the existing rights of the ward or beneficiary were given up during minority. [4]Likewise Cutch and Sawantawadi, lost their mints; lands were absorbed to the Residency in Indore; their sovereignty over railway territories was lost during minority regimes in Patiala and Jind; Idar lost some of its Jagirdars. When the Rao of Cutch was a minor and the administration was presided over by the Political Agent (1879) the salt agreement was concluded; likewise the salt industry was ruined in Patiala during the minority regime in 1904.

Minority Administration G. O. of 1917

During the Viceroyalty of Lord Hardinge (1913 and 1914) the opinions of certain Ruling Princes and Chiefs and of Political Officers were obtained by the Government of India. The Governor-General-in-

[4] Vide K. R. R. Sastry "Indian States."

Council has with the approval of the Secretary of State, decided in 1917 that the policy of the Government in this matter may appropriately be stated in the form of principles to be observed during minority Administration.[5] The Government of India recognized that they were the "trustees and custodians of the rights, interests and traditions of native states during a minority administration."

Subject to the reservation that special conditions in individual cases might require a relaxation of principles, certain principles have been laid down. Ordinarily the administration of a State during a minority should be entrusted to a Council. It may be a Council of regency or a Council of Administration. Old traditions and customs of the State should be scrupulously observed and maintained. The Regulations and Records embodying the established policy of the State should be carefully studied. For appointments to the State Service, local talent should be used wherever possible. Treaty rights should be strictly upheld and measures involving any modification of existing treaties and engagements should be avoided. No State territory or other immovable property should be exchanged, ceded

[5] Vide Govt. of India Foreign and Political Dept. Resolution No. 1894-1A. Simla, August 27, 1917.

or sold during a minority. No permanent or long-term Commercial Concessions or monopolies should ordinarily be granted to individuals or companies. The education and training of the young Ruler should be conducted on the lines laid down in the report of the committee convened to consider the matter. As a general rule it is preferable that he should have his education in India rather than in Europe.

Some cherished and valuable rights have been taken away unjustifiably during minority administrations, and it can be hoped that the Government of India will discharge its functions in the correct capacity of "trustees and custodians of the rights, interests, and traditions" of Indian States.

Certain Other Cases

Under such a miscellaneous heading, the Indian States' Committee examines the intervention of the Paramount Power which has introduced the jurisdiction of its officers in cases of:—

(*a*) Troops in Cantonments.

(*b*) Other Special areas in Indian States.

(*c*) European British Subjects.

(*d*) Servants of the Crown in certain circumstances.

Paramountcy and States' Subjects

The Princes' delay in replying to the draft Instrument of Accession gives room for the inference that they feel they have not obtained from the Paramount Power the protection from outside interference to which they consider themselves entitled under their treaty rights. How paramountcy has affected the subjects of the States now remains to be explained. There is, however, an insuperable difficulty in the way of the inquirer into this question: The records of the Political Department are not open to 'inspection by the general public[6]'. One has therefore to content oneself with secondary evidence.

Problems relating to the policy of the Paramount Power cannot be satisfactorily discussed by purely legal formulæ. A careful study of the abundant historical material contained in the views of Warren Hastings, Lord Cornwallis, Wellesley, The Marquess of Hastings, Lord Dalhousie, Canning, Lord Mayo, Lord Curzon, Lord Reading, Lord Irwin and the Marquess of Linlithgow will show that 'theories of political or international law' did not always guide them; as Mr. M. Ruthnaswamy puts it: "The idea of paramountcy

[6] From the reply of the Deputy Secretary, Political Department, Government of India to the author dated 10th Jan. 1940.

is an original political idea forged by the British in the factory of experience.'"[7]

A cardinal principle that emerges in the Indian political system is the 'denial of any right divine to govern wrong' vesting in the Indian Princes. The following cases of intervention by the Paramount Power abundantly illustrate this position.

The Raja of *Jaintia* (in 1832) failed to comply with a demand for the apprehension of persons concerned in the kidnapping of four British subjects to be offered as victims to the goddess Kali. His territory in the plains was confiscated; thereupon he voluntarily relinquished his subjects in the hills in return for a pension.

In *Mysore* the Raja set up by the British Government had misgoverned in spite of warnings repeated over several years, and half his kingdom revolted in 1830. A British force was sent to quell the insurrection, and the administration was entrusted to British officers and remained in British hands for fifty years.

For more than half a century oppression and misrule persisted in *Oudh*. Lord Dalhousie's description could not be improved upon; the sovereigns of Oudh

'have never seen the misery of their subjects; their ears have

[7] *Some influences that made the British Administrative System in India* (1939), p. 605.

never been open to their cry. Secure of the safety of his person, secure of the stability of his throne, each successive ruler has passed his life-time within the walls of his palace, or in the gardens round his capital, careful for nothing but the gratification of his individual passion—avarice, as in one; intemperance, as in another, or, as in the present King, effeminate sensuality, indulged among singers, musicians and eunuchs, the sole companions of his confidence, and the sole agents of his power.'

Though there was agreement as to the responsibility of the British to undertake the government of the State, there was difference of opinion as to the basis of the right to do this and the way of achieving it. Mr. J. Dorin wanted to 'assert the right of the Government of India as the Paramount Power to adopt its own system of government in respect to any portion of the Indian Empire that is hopelessly ground to the dust by the oppression of its native rulers.' A double right was asserted by Sir J. P. Grant in his Minute on the basis of the British Government succeeding to the empire of the Great Moghul. He asked: 'Is it only when the people are concerned that we should hesitate to assert our supreme dominion?' General Low agreed that the treaty with Oudh was annulled, but thought that the king should be persuaded to sign a new treaty making over the whole kingdom permanently to the exclusive management of the British. Without withdrawing the

troops or the Resident, a new treaty was offered; and on its rejection, the administration was authoritatively assumed.

During Lawrence's viceroyalty, the Ruler of *Tonk*, who was 'said to have abetted murder,' was deposed, and his infant heir was installed in his place. But the opportunity was availed of to 'mulct the State of certain territories.'[8]

Reassuring Sanads of Adoption were issued by *Lord Canning* to 160 States in 1862; in his Minute of 1860 he said:

'The Government of India is not precluded from stepping in to set right such serious abuses in a native government as may threaten any part of the country with anarchy or disturbance, nor from assuming temporary charge of a native State when there will be sufficient reason to do so. Of this necessity the Governor-General in Council is the sole judge, subject to the control of Parliament.'

In his great darbar in Rajputana, *Lord Mayo* said to the Princes: 'If we respect your rights and privileges, you should also respect the rights and regard the privileges of those who are placed beneath your care. If we support you in your power, we expect

[8] *The British Crown and the Indian States* (published by the Chamber of Princes), p. 60.

in return good government.'

In *Jhabua*, a temple built and endowed by the Chief's mother had been plundered (in 1865); a man named Kasia was charged with the offence; but before the investigation was completed and when he had not yet been found guilty, he was mutilated by the amputation of one hand and one foot. 'The order for this atrocity appears to have been given by the mother of the Chief, and it was found that the Chief himself was cognisant of it.'[9] Through a notification in the Gazette of India, the Chief's salute of 11 guns was discontinued on the ground of his having 'knowingly permitted a case of mutilation to occur in his capital.'

In *Tonk*, Muhammad Ali Khan was deposed by the British Government in November 1867 as a punishment for his complicity in the attack on the uncle and followers of his tributary, the Thakur of Lawa.

The Gaekwar of *Baroda* (Mulhar Rao) was advised to adopt measures relating to the future treatment of the relations and dependants of his late brother Khande Rao, and to prevent and punish torture, spoliation of bankers and trading firms, corporal punishment and personal ill-treatment of women, and their abduction for forced service in the palace. After the report of the first

[9] Sir Charles Tupper, *op. cit.*, p. 295.

Baroda Commission in February 1874, the Gaekwar was given time till December 3, 1875. He objected that the appointment of the Commission was not warranted by the existing relations between the Baroda State and the British Government. Lord Northbrook answered that intervention in Baroda was in accordance with treaties: Art. V of the Treaty of 1802 states that the 'Company will grant the said Chief its countenance and protection in all his public concerns according to justice and as may appear to be for the good of the country, respecting which he is also to listen to advice.'

'My friend,' Lord Northbrook went on, 'I cannot consent to employ British troops to protect any one in a course of wrong-doing. Misrule on the part of a Government which is upheld by the British Power is misrule for which the British Government becomes in a measure involved. It becomes, therefore, not only the right but the positive duty of the British Government to see that the administration of a State in such a condition is reformed and that gross abuses are removed.'

On November 9, 1874, an attempt was made to poison 'the Resident by means of arsenic administered in some fruit-juice which he was in the habit of drinking after his morning walk.'[10] A Proclamation was issued on

[10] *Sayaji Rao III*, by S. Rice, Vol. I, p. 6.

January 13, 1875, and the second Baroda Commission, consisting of Sir Richard Couch, Sir Richard Meade, Mr. P. C. Melville, Sir Dinkar Rao, Maharaja Scindia, the Maharaja of Jeypore, and the Maharaja Holkar, was appointed to try the charges and report to the Government of India. The three Europeans found the Gaekwar guilty; the Maharaja Scindia and Sir Dinkar Rao found the graver imputation not proved; the Maharaja of Jeypore found the Gaekwar not guilty; and the Maharaja Holkar had excused himself from serving on the Commission. The charge was not proven; yet by a Proclamation dated April 19, 1875, the Gaekwar was deposed and the widow of the late Khande Rao—H. H. Jumnabai—was permitted to adopt a boy of the Gaekwar House selected by the British Government. In his Dispatch No 69 dated June 3, 1875, to the Governor-General in Council, the Secretary of State said:

'Incorrigible misrule is of itself a sufficient disqualification for sovereign power. His Majesty's Government have willingly accepted the opportunity of recognizing in a conspicuous case the paramount obligation which lies upon them of protecting the people of India from oppression.'

During 1890-91, the *Manipur* State was the scene of much anarchy. The peace of the State was disturbed by the quarrels of the Ruler's seven brothers. On September 21, 1890, the palace walls were suddenly scaled by

his two younger brothers. While the timid Maharaja wanted to abdicate, the Senapati induced his elder brother the Jubraj to occupy the *gadi*. The Government of India agreed to recognize the Jubraj; but it was also decided to remove the Senapati from Manipur. A serious engagement ensued and the Manipuris attacked the Residency. An expedition was undertaken to reassert 'the political supremacy of the British Government.'[11] The Senapati and the two elder brothers were tried by a special commission at which the Senapati was convicted of waging war against the Queen-Empress and of abetting the murder of British officers. He was sentenced to death and hanged.

Lee Warner cites this as an example of the assertion of the Paramount Power's 'unquestioned right to remove by administrative order any person whose presence in the State may seem objectionable.' This view, however, is not tenable in law, for the Government of India could not intervene and arrest a *subject of a state* or indict him for rebellion; at best the Manipur trial can be considered as an act of prerogative justified by necessity rather than 'a legal power in the Government of India.'

The famous *Curzon Circular* stated that 'the ruler

[11] *Treaties, Engagements, and Sanads*, by Sir Charles Aitchison, Vol. II (IV Ed.), pp. 261-262.

shall devote his best energies, not to the pursuit of pleasure nor to the cultivation of absentee interests or amusements, but to the welfare of his own subjects and administration.'[12] Repeated absence from India would be regarded as a dereliction of duty. The reaction of an important Chief to this Circular was: 'We are all supposed to be Chiefs, but we are treated as worse than paid servants.' But this Circular was never harshly applied; Lord Minto foreshadowed a change of policy in his speech at Udaipur (1909) which took shape in 1920 when the more galling restrictions were removed.

In 1906 the Chief of *Aundh* was accused of murder and dacoity. The case was investigated by a special tribunal, and the Pratinidhi was suspended for five years and later deposed in 1909.

Not all the facts are available in connexion with some recent cases, like the Nabha Case (1922), the curtailing of the powers of the late Maharana of Udaipur, the Alwar Case, and the Nizam *vis-ā-vis* Berar.

In the *Nabha* Case, the Government of India made it clear in a Resolution that their intervention was due to the alleged interference of the Ruler of Nabha in the affairs of a 'powerful neighbour' (Patiala) and to the gross and systematic misuse of the judicial machinery of

[12] *Gazette of India*: Supplement, August 25, 1900.

the State with the active connivance of the Ruler. The Nabha Ruler was deposed.

With regard to the unfortunate intervention in *Udaipur*, the foremost Rajputana State, Sir William Barton says that the late Maharana's 'methods of administration were of almost equally respectable antiquity. There was, for example, no system of finance, no supervision of local officers. This kind of things, combined with the political agitation directed from British Ajmere, led to trouble with the indigenous tribes. Unfortunately, the British Government felt it necessary to deprive this old and loyal ruler of most of his powers, a measure which embittered his declining years.'[13] This case can be criticized from legal as well as administrative grounds of high policy.

The *Indore* case is on surer ground. A sensational crime was committed in one of the thoroughfares of Bombay by men connected with the Indore Administration. The Government of India demanded that an inquiry should be made into the whole case to find out the personal responsibility of the Ruler. The modern practice in cases of grave misconduct of a Prince is to offer a trial by a Commission consisting of a judicial officer not lower in rank than a High-Court Judge and

[13] *The Princes of India*, pp. 94-5.

four other persons of high status of whom not less than two shall be Ruling Princes. The Indore Maharaja elected to abdicate rather than face such an inquiry. Parallels can be adduced from international practice, like Austria's demand for an inquiry after the Serajevo Murder, to justify the Paramount Power.

In the *Bharatpur* Case, the only charge seems to have been 'financial paralysis' amounting to gross misgovernment. Can it be cited as a justifiable ground of intervention?

In a reply, dated March 27, 1926, to the Nizam's request for the appointment of a commission to inquire into the *Berar* Case, Lord Reading said that there was no provision 'for the appointment of a court of arbitration in any case which has been decided by His Majesty's Government.' This letter has served to support the supremacy of the British Government in India as not only based 'upon Treaties and engagements' but 'existing independently of them and quite apart from its prerogative in matters relating to foreign powers and policies.' Lord Reading went on to say:

'The right of the British Government to intervene in the internal affairs of Indian States is another instance of the consequences necessarily involved in the supremacy of the British Crown. The British Government have indeed shown again and again that they have no desire to exercise this right without grave

reason.....The varying degrees of internal sovereignty which the Rulers enjoy are all subject to the due exercise by the Paramount Power of this responsibility.'

The Butler Committee

The Indian States' Committee has in the main followed Lord Reading's dicta and laid down that intervention by the Paramount Power might take place for the benefit of the Prince, for the benefit of the State, or for the benefit of India as a whole. Intervention for the benefit of the State may arise out of gross misrule, disloyalty, serious crime, or the existence of barbarous practices. In cases of gross misrule, intervention may take place in the form of deposition, curtailment of authority, or appointment of officers to supervise. Modern political practice generally calls for the report of a Commission. A Ruler guilty of disloyalty courts the intervention of the Paramount Power. Intervention for the suppression of *Sati*, infanticide, torture, and other barbarous punishments could be justified on broad humanitarian grounds.

The Princes, who were still pressing for a definition of Paramountcy, were thus authoritatively answered by the Secretary of State for India in the House of Commons:

'In the ultimate analysis.....the Crown's relationship with the

States is not merely one of contract, and so there must remain in the hands of the Viceroy an element of discretion in his dealings with the States. No successful attempt could be made to define exactly the right of the Crown's Representative to intervene.'[14]

Conclusion

In untrammelled autocracies the remedy against unbearable despotism is 'mutiny, rebellion or palace-murder.' 'Against these fates the strong hand of Britain guarantees the incumbents of the Princes' throne.'[15]

The Political Agent, though he is no longer the bully he was, has become the repository of 'almost unique powers.' As the Rt. Hon. Srinivasa Sastri put it in his famous Cochin speech: 'Secrecy, secret dispatches, mysterious communications, orders and regulations which nobody can understand, which vary from state to state or from moment to moment in each State, these form the pabulum of a whole heirarchy of officers.'

Under such protection by the Paramount Power, it is inevitable that 'the influence of the Raja, which is indispensable for the individuality of the State, is thereby impaired.' The Ruler 'being discouraged, slackens

[14] *House of Commons Debates*, March 20, 1935, p. 1236.
[15] Sir G. Macmunn: *Indian States and Princes*, p. 158.

his interest in the continuity of his policy.'[16] It must also be admitted that by bringing the States to follow the path of 'subordinate co-operation,' the Paramount Power has weakened the efficacy of checks on the abuse of autocracy.

That the Princes chafe when political ideas 'overleap frontier lines like sparks across atreet,' is evident from the following speech of the late Maharaja of Patiala in the Chamber of Princes (January 1935):

'It must be clearly understood that the Princes will accept no Constitution which would even by implication vest in any authority except themselves the right to decide their relations with their own people, the right to modify or alter their own polities, their right to live in the manner they and their people choose.'[17]

More than six hundred Protected States and Jagirs persist in India. Most of these are medieval autocracies. Ultimately the Paramount Power is responsible for the happiness and prosperity of their subjects. In sheer disgust it is suggested that all the States should be liquidated and the ruling families pensioned off. The more feasible view is to incorporate the minor States—of the dependent class—into the adjacent Provinces.

[16] The late Gaekwar in an article on 'My Ways and Days' in in *The Nineteenth Century*, February 1901.

[17] K. M. Panikkar, *The Indian Princes in Council*, p. 181.

For without this the minimum standard of civilized administration in all the States suggested as early as 1927 by Lord Irwin cannot be achieved.

The major States should turn into constitutional monarchies like England. The establishment of responsible government in such States—by stages, if necessary—is the only way of 'restricting Paramountcy to its proper field of action.'

The Princes as a class have not yet realized this aspect of the question. They are bound to be further shaken out of their lethargy by the present European war which is fought mainly and directly for the preservation of freedom and democracy. The Rulers of Indian States cannot offer their services in such a fateful maelstrom while they continue to be despots at home.

Paramountcy

Sir W. Holdsworth's Theory Examined

"The idea of Paramountcy is an original political idea forged by the British in the factory of experience."[18]

Sir W. S. Holdsworth defends the theory propounded by the Indian States' Committee—of which he was a distinguished member—that "the Crown cannot cede

[18] M. Ruthnaswamy, *British Administration in India*, p. 605.

its rights and duties as Paramount Power to any other State."[19] Further, he postulates that since the 'usage accepted by the Princes is the most important basis of Paramountcy and since Paramountcy resting upon this basis is a source of a separate part of the Prerogative, no alteration in this usage or in the Prerogative resulting from it can be effected without the consent of the Princes.

As an eminent jurist he is no doubt aware of the curious proposition he is thus advancing against the legal supremacy[20] of the Parliament of Great Britain. From Lee Warner down to the Indian States' Committee, Paramountcy has been advisedly left undefined. But the bogey of a 'separate prerogative of the Crown resting upon treaties, engagements, *sanads*, usages, and sufferance,' and a curious 'usage which gives suzerainty to a Paramount Power over States possessed of some of the powers which make up sovereignty' are raised for the purpose of linking them irrevocably to the 'Crown acting through agents responsible to the Parliament of Great Britain.'

This novel theory is based on 'legal and technical grounds as well as on grounds of policy.' So far as the

[19] *Law Quarterly*, 1930, p. 429.

[20] 'Supremacy' is preferable to sovereignty: Dr. Jennings, *Law of the Constitution*, p. 129.

legal basis is concerned, three arguments have been advanced by the eminent Indian jurist, Sir P. S. Sivaswamy Iyer, in support of the correct historical position that 'the Crown acted, not in a personal capacity or in the capacity of Sovereign of England, but in the capacity of Ruler of British India, in its relations with Indian States.'[21]

In spite of Prof. Holdsworth's criticism, the nearest correct analogy to the rights and obligations under the treaties with the Princes is 'in the nature of Covenants running with the land or prædial servitudes' (according to Sir P. S. S. Iyer). These treaties generally have not the character of conveyances (except perhaps the Rendition Treaty of 1881 with Mysore); they have not the character of contracts, though they can be called treaties creating rights in the nature of servitudes of a non-political nature; they are not law-making treaties, nor are they treaties akin to charters of incorporation.[22] The fact is that these treaties, engagements, and *sanads* were made in the eighteenth century on a basis of equality. The Court of Chancery in the *Nabob of the Carnatic* v. *East India Company* held that the Treaty was 'the same as if

[21] *Indian Constitutional Problems*, by Sir P. S. S. Iyer, pp. 210-213.

[22] Cf. Dr. A. D. McNair's excellent classification of treaties in *The British Year-Book of International Law*, 1930, pp. 100-118.

it was a Treaty between two sovereigns.'[23] From the beginning of the nineteenth century, we have treaties of 'submission, of obedience, of protection, or of subordinate co-operation.'

Again, Prof. Holdsworth's ingenious reply to Sir P. S. Sivaswamy Iyer is couched in the statement that 'a change in the form of the government of British India which gave to British India full responsible government in effect brings into existence a new and autonomous State.' To call India with Dominion Status a 'new State' *is* surprising. Prof. Holdsworth is driven to this length for the purpose of evolving the argument from Professor Hall that a contract ceases to be binding when 'anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered.'[24] Are the Dominions to be construed as *new* States after the Statute of Westminster? There is, in spite of the Statute, a singular unanimity among British constitutional writers that 'there is no deviation from the unity in the fact that the Crown appears in various aspects and that in these aspects there may be collisions of interests and of rights' (Prof. A. B. Keith). Since the passing of the two recent Acts (the *Status of Union Act*,

[23] 2 Ves., p. 60.
[24] Hall: *International Law*, 6th ed., pp. 342-343.

1934, and the *Royal Executive Functions and Seals Act*, 1934) in South Africa, it would appear that 'all the prerogatives of the Crown in relation to South Africa are capable of being distinguished and separated from those in relation either to the United Kingdom or to the rest of the Empire, or to other self-governing Dominions.'[25] In fact, the seventh contract to be entered into for India by the Crown has been anticipated by Mr. Noel Baker. The correct way to interpret it is to regard the Crown (according to Mr. Fitzgerald) 'as the same King acting in a several capacity.'

There is still some force in Sir P. S. S. Iyer's third argument based on the Government of India Act—1915-1919—when the relations of the States were with the Governor-General in Council.

Besides these arguments, two remarks have to be made. There can be no limitation upon the doctrine of legal supremacy of Parliament in Great Britain. Secondly, there is not in constitutional law a single prerogative of the Crown which the Parliament cannot touch by enacting a statute for its abridgment, curtailment, or other mode of regulation. It has also been held that when the operation of a statute overlaps the exercise of a prerogative, the prerogative is superseded to the

[25] Evatt: *The King and His Dominion Governors*, p. 313.

extent of the overlapping.[26]

The argument based on 'grounds of policy' might work so much against the inevitable development of India into a Dominion as understood under the Statute of Westminster, that it deserves to be knocked on the head. It looks rather strange that Prof. Holdsworth, while disagreeing with the argument of the Counsel for the Princes based on their 'treaty-sovereign rights,' is building up a laboured argument on 'usage' which on his own showing has to be foisted upon a strained basis of 'implied consent.' The Counsel for the Princes strenuously argued that 'mere usage cannot vary the treaties or agreements.' Prof. Holdsworth has built up a golden chain linking the Princes for ever with 'the Crown, acting through agents responsible to Parliament,' basing one of his main arguments on the special character of usage as a source of Paramountcy.

As Mr. N. Rajagopal Iyengar has put it: 'The determination with anything like legal precision of all the prerogatives of the Crown in India, is by no means an easy task.'[27] In further complication, Prof. Holdsworth's argument is that 'Paramountcy is only a part of

[26] *Attorney General* v. *De Keyser's Royal Hotel Ltd.*, 1920 A.C., 508.

[27] *The Government of India Act*, 1935 by N. Rajagopal Iyengar, p. 11.

the prerogative.' The next step in his argument is that the 'prerogative is not the source of Paramountcy.' He then develops his thesis that 'the growth of Paramountcy has added a new and a distinct prerogative to the Crown.'

This hydra-headed creature, which is ever growing and whose ambit refuses definition, has at once to face juristic modifications:

(*i*) Certain of the rights possessed by the Paramount Power, e.g., the right to confer honours and decorations and to decide questions of precedence, have to owe their origin 'to certain of the powers possessed by the King in virtue of his prerogative.'

(*ii*) The King by virtue of his prerogative also possesses large powers 'of control over such matters as foreign affairs, national defence, justice, or trade.'[28]

It may be urged that directly or indirectly all the powers of the Paramount Power, including those of deposing a Ruler for gross misrule, are *derivable* from the Crown's prerogative powers as described by an illustrious jurist like Blackstone.

[28] Cf. Blackstone: *Commentaries*, I, 252-278.

In this connexion we may note the legal act of resumption of powers by the Crown and their redistribution in the Government of India Act of 1935. Under Section 2,

1. 'All rights, authority, and jurisdiction heretofore belonging to His Majesty the King Emperor of India which appertain or are incidental to the Government of the territories in India for the time being vested in him, and all rights, authority, and jurisdiction exercisable by him or in relation to any other territories in India, are exercisable by His Majesty except so far as may be otherwise provided by or under this Act or as may be otherwise directed by His Majesty; provided that any powers connected with the exercise of the functions of the Crown in its relations with Indian States shall in India, if not exercised by His Majesty, be exercised only by, or by persons acting under the authority of, His Majesty's Representative for the exercise of those functions of the Crown.
2. 'The said rights, authority, and jurisdiction shall include any rights, authority, or jurisdiction heretofore exercisable in or in relation to any territories in India by the Secretary of State in

> Council, the Governor-General, the Governor-General in Council, any Governor or any Local Government whether by delegation from His Majesty or otherwise.'

It will certainly give satisfaction to the Indian States' Committee that the phrase *'or otherwise'* will include rights acquired through 'usage, sufferance, or political practice.'

Mr. N. D. Varadachariar has also ably argued from English Constitutional practice and the fact of change of agency from the East India Company to the Crown without consulting the Rulers in 1858 (*Vide* §67, Government of India Act 1858) that there is not much substance in the plea of the princes that their rights and obligations arising from the Treaties, Engagements and *Sanads* cannot be assigned by the Crown to any other party except with their consent. "The true position appears to be that since as a matter of law the Crown can only act on advice it is of no concern to strangers who have nothing to do with the course of development of British Constitutional Law, as to which advice it acts under at a given time."

It may be said that in a sense the discussion whether the relations of States were with the Government of India or the Crown *simpliciter* has been ended. Even

after the resumption and redistribution of all powers by the Crown, from Dominion practice as well as from the Royal and Parliamentary Titles Act of 1927 (which continues the term 'Emperor of India'), the Crown has to be taken *vis-á-vis* his functions in this context as Emperor of India. Having succeeded to the East India Company, the Crown as Sovereign of British India is the legal entity which functions as Paramount Power. Dominion Status, when granted to India, will create, not a new State, but only an autonomous State. The Parliament of Great Britain is legally supreme, and a statute of Parliament can always cede the exercise of its Paramountcy to Ministers responsible to an Indian Legislature. When the Legislature becomes federal, as is envisaged under the Government of India Act of 1935, the accession of the Federating States will legally accelerate this inevitable process.

Legal cobwebs apart, the Indian States owe their subordinate co-operation, not to the Crown in his personal or individual aspect, but to 'His Majesty, the Emperor of India' in his political aspect.

Sir Akbar Hydari, the doughty champion of Hyderabadi's interests, has put in a laboured plea for the position that "Hydérabad and the states have always insisted that our relations are with the Crown in the United Kingdom." Further, Sir Akbar has laid down the *ipse dixit*

that any constitution in India, if it involved even a partial transfer of the relations of States with the Crown to any other authority, must necessarily require the assent of the Nizam. Prof. A. B. Keith has answered by adverting to the famous pronouncement of Lord Reading to the Nizam dated 27th March 1926 and effectively stating that "there is in fact no answer to Mahatma Gandhi's claim that *the Princes are bound to follow the Crown in its transfer of authority to people.*"

CHAPTER VIII

THE BERAR QUESTION

Cotton stuffed the ears of justice
and made her deaf as well as blind.
—*J. B. Norton*

When all the direct pieces of evidence regarding the fateful question of Berar are published, they are sure to lend much weight to the above reflection of J. B. Norton. As Mr. Russell, in his memorable speech in defence of Palmer & Co., put it: "the great misery of the troops of native governments in India is, that they are not regularly paid, and are consequently in want of food."[1] Likewise, financial difficulties of the Nizam's Government in paying the Nizam's Contingent (?) had unfortunately given rise to the Berar Question.

One has to go back to 1766 when a treaty of 'perpetual honour, favour, alliance, and attachment' was concluded between the "Great Nawab".....and the East

[1] Quoted in Briggs: *The Nizam*, Vol. II, p. 182.

India Company. By this treaty, in return for the Circars of Ellore, Chicacole, Rajamahendri, Mustafanagar and Guntur, the East India Company agreed to furnish the Nizam with a subsidiary force when required and to pay nine lakhs a year when the assistance of their troops was not required (Art. 2, 3 and 8).

In 1790, a new treaty was concluded to avert the impending attack of Tippoo Sultan; further treaties of alliance were entered into in 1799 and 1800 in "face of the challenge of the Mahrattas." A body of troops known as the "Subsidiary Force" came into existence under the provisions of the Treaty of 1766. On the one side, the Nizam had to co-operate in the wars which marked "the gradual consolidation of the Company's possessions"; on the other, the organization of a force "officered by British soldiers" was necessary for "the dual purpose of maintaining the Nizam's authority within the confines of his own dominion and of further assisting the Company"[2] in its wars.

By the XII article of the Treaty with the Nizam (1800), the Nizam agreed in the event of war "between the contracting parties and any other power whatever" to furnish "6000 infantry and 9000 horse of His Highness' own troops" to co-operate with the British army.

[2] Ronaldshay: *Life of Lord Curzon,* Vol. II, p. 215.

During the opening years of the Nineteenth Century, a further force was added, known as the Nizam's Contingent. Did it ever have the consent of the Nizam at its start?

Advances had to be made from the British treasury for the payment of this contingent force; in 1843 the Nizam was distinctly informed that "in the event of application for further advance, a territorial security for the payment of the debt would be demanded." With the approval of the British Government, two Ministers were appointed in 1848 and 1849 respectively; but really no efforts were made to pay off the debt on account of the contingent. In 1849, a requisition was made for the payment of the debt by 31st December, 1850.[3] Since no steps were taken, a territorial cession was demanded in 1851 to liquidate the debt which then had mounted up to more than Rs. 78,00,000. In a letter to the Resident, dated November 20, 1849, the Governor-General wrote that he

> was quite disinclined to recur again to the periodical advance of the pay for the contingent, implying as it does, previous inconvenience and hardship upon the troops, as well as a gradual increase of the already existing debt.

[3] *Vide* letter from Dalhousie to General Fraser, dated November 20, 1849.

The Nizam will force me, (he continued) in such a case to take possession of territory *at once*, whereby the means of paying the contingent with certainty and regularity will be placed in the hands of this Government, virtually pledged to ensure such payment.[4]

In a letter dated 19th December, 1849, General Fraser answered Lord Dalhousie's enquiry as to the best districts to be appropriated as security for payment of the debt.

"Berar Payan Ghat is the richest and most profitable portion of the Nizam's Dominions, both in an agricultural and commercial point of view and I have never heard of any particular difficulty existing with regard to the collection of its revenues." I believe (continues the Resident in his letter to the Governor-General) there is no part of India superior to it for the production of cotton; and the culture and exportation of this article might, under our management, be extended to a much greater degree than has ever been the case.

In August, 1851, a payment of Rs. 40,00,000 was made by the Nizam; and the appropriation of certain districts was promised to meet the remainder.

No real improvement followed. The Resident was obliged to make further advances for the payment of the Contingent and in 1853 the debt had again risen to upwards of Rs. 45,00,000.[5]

[4] Letter published in *Memoirs and Correspondence of Gen. Fraser*, p. 303.

[5] Aitchison, IV Ed., Vol. IX, p. 9.

LORD DALHOUSIE'S TREATY OF 1853

A close study of the letters of Colonel Low, the Resident who had succeeded General Fraser, impresses on a student of history and law that *the treaty was founded on intimidation and compulsion.* In his Minute of the conversation with the Nizam made on 12th March, 1853, the Nizam's chafing against the costliness and need of the contingent read thus:

In the time of my father (said His Highness) the Peshwa of Poona became hostile both to the Company's Government and to this Government, and Sahib Jung (meaning Sir Henry Russell) organized this contingent and sent it in different directions, along with the Company's troops, to fight the Mahratta people; and this was all very proper, and according to the treaty, for those Mahrattas were enemies of both states; and the Company's army and my father's army conquered the ruler of Poona and you sent him off a prisoner to Hindoosthan, and took the Country of Poona. After that there was no longer any war: so why was the contingent kept up any longer than the war?

The argument that the financial liability to maintain the contingent arose since the clause in the Treaty of 1800 "to demand at any moment 15000 troops" from the Nizam had been broken in former times was suggested in reply by Col. Low, the Resident. But the Nizam's denouncing his responsibility since Raja Chandoo Lall alone consented to the contingent is untenable in law as

well as political theory.

Another line of argument by the Nizam is clear from the Minute of Col. Low dated May 4, 1853. Asks the Nizam:

Did I ever make war against the English Government, or intrigue against it? Or do any thing but co-operate with it and be obedient to its wishes, that I should be so disgraced?"[6] (Continued the Nizam powerlessly): Two acts on the part of a Sovereign Prince are always reckoned disgraceful; one is to give away unnecessarily any portion of his hereditary territories, and the other is to disband troops who have been brave and faithful in his service.

In the same Minute it is stated that the Nizam, in a tone of anger of 'no ordinary degree,' exclaimed:

You think I could be happy if I were to give up a portion of my Kingdom to Your Government in perpetuity, it is totally impossible that I could be happy: I should feel that I was disgraced.

When there was some hesitation thus on the Nizam's part to execute the Treaty assigning the revenues of certain districts for the liquidation of his debt, writes Mr. Briggs:

An English officer was seen, for days together moving about the outworks of the city with telescope in hand, as if ascertaining

[6] Printed in *Briggs: The Nizam.* Vol. I, p. 394.

the defences to some dangerous intent.

Colonel Davidson, Resident at Hyderabad, wrote in a letter to the Foreign Secretary dated Hyderabad, October 12, 1860:

> I was present during the negotiations that took place in 1853 .....I witnessed the objurgations and threats then used in order to induce the late Nizam to acquiesce in the Government's proposals.

The Treaty of 1853 was concluded under such pressure administered to a friend and ally. By it, the British Government agreed to maintain in addition to the subsidiary force, an auxiliary force, called the "Hyderabad Contingent" (Art. 3) of not less than 5000 infantry, 2000 cavalry and four field batteries of artillery. In order to provide for the payment of this force and for certain pensions and the interest on the debt, the Nizam assigned the districts in Berar, Dharaseo, and Raichur Doab which were estimated to yield a gross revenue of fifty lakhs of rupees. It was also agreed that the Resident at the Court of Hyderabad

> shall always render true and faithful accounts every year to the Nizam of the receipts and disbursements connected with the said districts, and make over any surplus revenue that may exist, to His Highness, after the payment of the contingent and the other items detailed in Art. 6. (Art. 8).

The account of Mr. V. Natesier of the Archaeological Department that the Nizam assigned the tract to the East India Company to meet the expenses of a subsidiary force is incorrect and misleading.[7]

Other Points of Criticism

A perusal of the speech of Colonel Sykes in the Court of Directors, suggests a preliminary basic argument.

> Although Captain Sydenham, the Resident, for the first time designates the Nizam's infantry as the Nizam's Contingent, he does not claim the shadow of authority for the designation. The Resident neither adverted to the authority of the Nizam for it, nor does it appear that the Nizam directly or indirectly sanctioned it or even knew of it.[8]

The official argument that the responsibility for financing the contingent lay on the Nizam under the Treaty of 1800 has now to be given up. Lord Dalhousie himself, though he was pressing this line of argument in his Khureeta to the Nizam (27th May, 1851, is the date of his Minute), is found giving it up in his Minute of 30th March, 1853. In the 44th paragraph of the above

[7] V. Natesier: *Historical Sketch of C. P. and Berar*, p. 36.
[8] Extracted *in Memoirs and Correspondence of General Fraser*, p. 359.

Minute, the Governor-General says:

> I for my part, can never consent, as an honest man, to instruct the Resident to reply that the Contingent has been maintained by the Nizam from the end of the war in 1817 until now, because the 12th article of the Treaty of 1800 obliges His Highness to maintain it.

Assuming without admitting that the advances made by the British Government for its pay constituted a debt properly charged against the Hyderabad State, had not the Nizam counter-claims against the East India Company? The British Government reduced the numbers of the Subsidiary Force and its expenditure without the Nizam's consent and against treaty obligations. Major Moore had explained this position in his Dissent to the Court of Directors on 7th November, 1853. In law and equity these savings ought to have been credited to the Nizam's Government.

The profits from the "Secunderabad Abkaree" derived by the Company used to amount, according to General Fraser, the Resident, to Rs. 60,000 p. a. Lord Dalhousie in his imperious tone answered that this "belonged to the Power whose troops they are." But, the Resident (Colonel Davidson) gave expression to a different opinion in a Despatch to the Government of India dated 12th October, 1860. He calculated that a

credit of £410,000 would have been got by the Nizam through surplus of Abkaree revenues from 1812 to 1853. He thus concluded that "in his opinion in 1853 we had little or no real pecuniary claim against the Nizam."

Treaty of 1860

Inconvenience and embarrassing discussions were necessitated by the clause in the Treaty of 1853 regarding submission of annual accounts. The Nizam's invaluable services to the British Government during the Mutiny of 1857 were also borne in mind prior to the Treaty of 1860. The lands assigned by Hyderabad yielded much more than was needed for the upkeep of the Contingent. The surplus districts of Daraseo and the Raichur Doab were handed back under the Treaty (Art. 5). The remaining assigned districts in Berar were to be "held by the British Government in trust" (Art. 6) for the purposes specified in the Treaty of 1853. But no demand for accounts of the "receipts and expenditure of the Assigned Districts for the past, present or future" is to be made according to the agreement by the Nizam to forego it (*vide* Art. 4 of the Treaty of 1860).

Further Attempts for Restoration

During the Nizam's minority, Sir Salar Jung, the famous minister, had made more than one attempt to obtain the restoration of Berar by payment of a capital sum. Lord Salisbury refused in 1878 a request for its restoration and supported the Government of India.

Lord Curzon's Visit

The retention of Berar continued an irritant in British Government's relations with the Nizam. As the brilliant biographer of Lord Curzon has put it:

> Lord Curzon's view was that though words in the treaties could be quoted which would fairly cover everything that had been done, yet there were passages in the history of the relations between the Company and the Nizam which were not in strict accordance with the most scrupulous standards of British honour.[9]

When the possibility of rendition was mooted, an agitation in Berar which had by then lived for three generations under British rule petitioned against any change.

Under the treaties in force, Berar was administered as an independent unit by a Commissioner and cadre of officials responsible to the British Resident at Hyderabad. The Hyderabad

[9] Ronaldshay: *Curzon*, Vol. II, p. 216.

Contingent was organized as a separate military unit with its own Headquarter-staff, having a Major-General at its head who was also responsible in the last resort to the British Resident at Hyderabad.....Proof of the wastefulness of the existing system was furnished by statistics. For whereas Berar had been made over to satisfy military charges which stood at the time at thirty-two lakhs of rupees, and whereas the revenue from it had risen to 119 lakhs a year, yet the surplus due to the Nizam had never exceeded Rs. 19,73,000 in any one year since the Treaty of 1860, and during the forty years which had since elapsed had averaged something less than nine lakhs a year.[10]

Two years of famine had necessitated the borrowing by the Nizam in 1900 of a sum of two crores of rupees from the Government of India; the Nizam had also accepted a further advance of Rs. 141 lakhs to meet the cost of famine in Berar.

A comprehensive permanent settlement of the question under which the Nizam would receive an annual rent was at the background, when imperialistic Curzon visited the Nizam in March 1902. On one side Lord Curzon felt that to both the Nizam and Hyderabad "perhaps, we owe some reparation. It would be highly profitable to Britain since, with no great sacrifice, and with the prospect of early financial gain, we shall have

[10] Ronaldshay: *Curzon,* Vol. II, pp. 216-217.

laid the Berar ghost for ever."[11]

Though he had heard misgivings about the Nizam's frame of mind, a private interview with the Nizam had brought about the prospects of the treaty easy. Two summaries of this historic conversation have been contributed to the Blue-book. The Nizam's account is short and blunt, while the Viceroy's "summary flows on in column after column of argumentative eloquence." In the course of the discussion, the Nizam explained that

> so long as there was the smallest chance of the complete restoration to him of the occupied territory, he would not feel justified in entering into any fresh agreement. If he learned from the Viceroy's own lips that no such chance existed, he would gladly accept the solution of the question which the Viceroy offered him."

As the biographer of Lord Curzon adds with gentle pathos:

> Lord Curzon experienced little difficulty in satisfying him on the point, and from that moment all doubts as to the successful issue of the negotiation disappeared.[12]

Not for the first time had it fallen to brilliant Cur-

[11] Minute by Lord Curzon, Sep. 25, 1901.
[12] Ronaldshay: *Curzon*, Vol. II, p. 218.

zon's lot to leave behind situations pregnant with later explosions. "Great triumph" he has had in settling "the famous Berar question, which has been a standing sore between Hyderabad and ourselves for 50 years."[13] Lest any coercion be smelt in his conversation with the Nizam, he begged the Secretary of State for India:

> Now pray do not think that the Nizam yielded out of personal deference to me or from weakness, or in alarm. He yielded in deference to my arguments and because he is firmly convinced that I am a friend to him and his State. Nor need you be afraid of any remorse or regret on his part. I venture to assert that at this moment he is the most contented man in Hyderabad.[14]

The Agreement of 1902

On 5th November, 1902, an agreement was signed between the Nizam and the British Government which was confirmed by the Government of India on the 16th December, 1902.

(*i*) His Highness the Nizam whose sovereignty over the Assigned Districts is reaffirmed, leases them to the British Government in perpetuity in consideration of the payment to him by the British Government of a fixed and perpetual rent of 25 lakhs of rupees per annum;

[13] Curzon's letter to Sir S. Macdonnell, d. April 10, 1902.
[14] Letter dated April 2, 1902.

(*ii*) The British Government while retaining the full and exclusive jurisdiction and authority in the Assigned Districts which they enjoy under the Treaties of 1853 and 1860, shall be at liberty, notwithstanding anything to the contrary in those treaties to administer the Assigned Districts in such manner as they may deem desirable, and also to redistribute, reduce, reorganise and control the forces now composing the Hyderabad Contingent, as they may think fit, due provision being made as stipulated by Art. 3 of the Treaty of 1853 for the protection of His Highness' Dominions.

The administration of Berar was entrusted to the Chief Commissioner of the Central Provinces and the Hyderabad Contingent has ceased to exist, the artillery having been disbanded and the cavalry and infantry absorbed in the regular army. The Governor-General in Council was legislating for this area under Orders-in-Council under the Foreign Jurisdiction Act.[15]

Under the Government of India Act, 1919, the Berars were administered with, but not as part of the Central Provinces. The inhabitants elected a certain number of representatives who were then formally nominated as members of the Central Provinces Legislature; and legislation both of that Legislature and of the Central Legislature has been applied to the Berar through the machinery of the Foreign

[15] Vide *Dattatraya* vs. *Secretary of State*, 57 I.A., 318.

Jurisdiction Act.[16] Berar being Hyderabad territory, the inhabitants of Berar are not British subjects but are subjects of the Nizam. Under Rule 14 (2) of the Devolution Rules, the revenues of Berar were allocated to the Local Government of the Central Provinces as a source of Provincial Revenue, but with the proviso that

> if in the opinion of the Governor-General in Council provision has not been made for expenditure necessary for the safety and tranquillity of Berar, the allocation shall be terminated by order of the Governor-General in Council or diminished by such amount as the Governor-General in Council may by order in writing direct.

Lord Reading's Letter

The Nizam had the satisfaction under Curzon's treaty, of his birthday being celebrated in Amraoti, the capital of Berar, by firing a Salute, to visualize a sign of his sovereignty. The present Nizam questioning the validity of pledging posterity, asked for a Commission to inquire into the whole case and for an account to be rendered of the pecuniary dealings between the two Governments. The Nizam was arguing his position of internal sovereignty *vis-a-vis* the Berar question

[16] Vide *J.P.C. Report*, para 61.

thus:

No foreign power or policy is concerned or involved in its examination and thus the subject comes to be a controversy between the two Governments that stand on the same plane without any limitations of subordination of one to the other.

Lord Reading took occasion to develop, in his reply letter dated 27th March, 1926, an extension of paramountcy as "based not only upon treaties and engagements" but existing "independently of them and quite apart from its prerogative in matters relating to foreign powers and policies."[17] He stressed the hard fact that "no ruler of an Indian State can justifiably claim to negotiate with the British Government on an equal footing."

The Nizam further urged that the doctrine of "*res judicata*" has been misapplied to matters in controversy between Hyderabad and the Government of India. To this aspect of the case, Lord Reading replied that the orders of the Secretary of State on his representation amount to a "decision".

It is the right and privilege of the Paramount Power to decide all disputes that may arise between States or between one of the States and itself, and even though a Court of Arbitration may

[17] For a criticism of this view of Lord Reading and that of the Butler Committee, *vide* the chapters on "Paramountcy" in K. R. R. Sastry: "*Indian States*," 1939.

be appointed in certain cases, its function is merely to offer independent advice to the Government of India, with whom the decision rests.

The portion of Lord Reading's reply regarding the use of the term *res judicata* is the least convincing.

> The Government of India is not like a civil court precluded from taking cognizance of a matter which has already formed the subject of a decision.

Thus far it is correct legal exposition; his following sentence urging the efficacy of "the legal principle of *res judicata* on sound practical considerations" in realms of diplomacy cannot be supported from municipal law, or international law. It comes to this, that if it serves the Paramount Power, it will import analogies from the legal regions, while at the same time standing stubbornly against anything like a legal interpretation of solemn treaties, engagements and sanads. The fact is that the Ex-Lord Chief Justice of England was here functioning as the proud proconsul sitting in the *gadi* of the Great Moghul in the direct line of Wellesley, Dalhousie, and Curzon.

With reference to the Nizam's request for the appointment of a Commission to enquire into the Berar case and submit a report, Lord Reading reminded the Nizam that

if, however, you will refer to the document embodying the arrangement, you will find that there is no provision for the appointment of a Court of arbitration in any case which has been decided by H. M.'s Government, and I cannot conceive that a case like the present one, where a long controversy has been terminated by an agreement executed after full consideration and couched in terms which are free from ambiguity, would be a suitable one for submission to arbitration.

The impression whether any pressure was brought to bear on the then Nizam by his "distinguished predecessor, the late Marquis Curzon," is reassuringly answered thus by Lord Reading: "I am glad to observe that in your latest communication, you disclaim any intention of casting imputation on the late Marquis Curzon."

Under the Government of India Act, 1935

The Act gets rid of the anomalous position. Under the Act, the administration of the Berars, "notwithstanding the continuance of the Sovereignty of His Exalted Highness over Berar," shall be as part of the Central Provinces (Section 47). The Berar members will in their oath of allegiance to His Majesty save their allegiance to His Exalted Highness in Form 3 of the fourth Schedule to the Act. Under Section 52 (2) the Governor of Central Province and Berars is vested

with a special responsibility of securing that a reasonable share of the revenues of the Province is expended in, or for the benefit of Berar; and the Instrument of Instructions issued to him directs that, if he is

> at any time, of opinion that the policy hitherto in force affords him no satisfactory guidance in the interpretation of his special responsibility, he shall, if he deems it expedient, fortify himself with advice from a body of experienced and unbiassed persons whom he may appoint for the purpose of recommending what changes in policy would be suitable and equitable.

The Agreement contemplated under S. 47 was concluded with the Nizam on 24th October, 1936. This has definitely reaffirmed and recognized His Exalted Highness' sovereignty over Berar and allowed its administration with the Central Provinces under the Government of India Act, 1935. With effect from 13th November, 1936, the Nizam shall hold the dynastic title of "H. E. H. the Nizam of Hyderabad and Berar." The King-Emperor was also graciously pleased to command that the Heir-Apparent of the Nizam shall be called "His Highness the Prince of Berar." And Sir M. Venkata Subba Rao, formerly of the Madras High Court, has been recently appointed as an Agent to represent the Nizam at the Capital of Central Provinces and Berar. This Agent is for the "purpose of representing the views of his government with reference to any matter

which is of common interest to the Central Provinces and Berar and to Hyderabad or which directly affects the interests of Hyderabad; save as aforesaid, the said Agent shall have no concern with any of the internal affairs of the Central Provinces and Berar." (Art. XI of the Agreement).

The Agreement which has been made in substitution for the Agreement of 5th November 1902 consists of 20 Articles with a Schedule. Provision for determining the Agreement on certain amendments being made, as for instance, inconsistent "with any of the provisions of the Agreement," is made in Art. XVII. In an authoritative collateral letter written to the Nizam by the Viceroy dated 26th October 1936, provision is made for the "unfortunate contingency of the agreement coming to an end." His Majesty, it is stated, "enters into the agreement" on "the clear understanding".....that in such a contingency, he "may exercise full and exclusive jurisdiction and authority" in Berar. The parts of the Agreement which would remain unaffected are the following:—

(*i*) The recognition of the Sovereignty of H. E. H. the Nizam over the Berar,

(*ii*) The payment of the sum of Rs. 25,000,000 to the Nizam,

(*iii*) Any of the military guarantees which under

existing treaties the Nizam enjoys,

(*iv*) The consent of the Nizam would be necessary, if any arrangement for the administration of Berar were made "upon a basis essentially different from that which exists at the present time."

It has to be noted that this elucidatory letter is of value only as evidencing the mind of His Majesty, one of the parties to the Agreement.

The Berar Question is a standing example of one of the results of maladministration of Indian states. It serves as a signal instance through its different phases of the growth and development of the undefined paramountcy, defying juristic analysis.

CHAPTER IX

INTERPRETATION OF TREATIES, ENGAGEMENTS AND SANADS OF INDIAN STATES

There are 601 States ruled by the Indian Princes. All varieties and shades of internal administration ranging from well-pronounced internal autonomy to maximum administrative control by the Paramount Power are found. About 40 States have "treaty" relationships; there are in the rest engagements and *sanads* binding the States with the Paramount Power. The vital question that has to be faced is this:—

> Is the letter of the treaties to be stuck to in spite of the changes of the status of the States from an international to an imperial plane?

The doctrine of *rebus sic stantibus* has been applied to these treaties by Lee Warner. Under this doctrine, "every treaty is understood to apply only so long as the circumstances contemplated by it continue to exist." Before a discussion of this doctrine, it is essential to appraise the place of these treaties in a scientific classifica-

tion of treaties. International treaties are conventions or contracts "between two or more States concerning various matters of interest." A treaty must not be confused "with various documents having relation to treaties but not in themselves treaties." These various ancillary documents may be "*memoirs*," "proposals," "notes-verbal," "proces-verbal," or "protocols." By far the best classification of treaties is that given by Dr. A. D. Mcnair[1]:—

(1) Treaties having the character of conveyances (*e.g.*, Treaty between G. B. and U. S. A., 1783).
(2) Treaties having the character of contracts.
(3) Law-making treaties which are divisible into treaties creating constitutional law and pure law-making treaties. Professor Westlake calls these "a part of the permanent system of Europe" (*e.g.*, The League of Nations Covenant; The Statute of the Permanent Court of International Justice).
(4) Treaties akin to charters of incorporation (*e.g.*, The Universal Postal Union, 1874).

What is the nature of the treaties between the Crown and the Indian States? Sirdar D. K. Sen states that

[1] B. Y. I. L., 1930, pp. 110-118.

these treaties are of a *personal* character. But, the nearest analogy to the rights and obligations under the treaties with the Princes is furnished by "Covenants running with the land or praedial servitudes" (per Sir P. S. Sivaswamy Iyer).

The general principles governing praedial servitudes were well-developed in Rome. The right secured in a praedial servitude must be an advantage to the ruling estate not to its owner merely.[2] Covenants running with the land play an important part in English law. It is often a difficult question "whether or not a covenant is so connected with the land as to run with it—*i.e.*, bind each successive assignee of the land."[3] The common law rules and the equitable gloss developed by a long line of cases are discussed by Professor Maitland in his "*Lectures on Equity.*"[4] Lord Birkenhead's *Law of Property Act* 1922 (12 and 13 George V *c.* 16) puts it thus consolidating common law and equity:—

> "A covenant runs with the land when the benefit or burden of it, whether at law or equity passes to the successors in title or the covenantee or the covenantor as the case may be." (§96 (4)). Just

[2] Buckland, *Text-Book of Roman Law*, I Ed., pp. 259-260.
[3] Digby, *History of the Law of Real Property*, V Ed., p. 415.
[4] Maitland, pp. 163-170.

applying this analogy, "the benefit or burden" of the treaties passes to the "successors in title," who are the Rulers recognized as such by the Paramount Power. If these treaties are taken to be personal in character, it unhappily cuts juristically at the very root of title of the present rulers, the enhancement of whose status is so dear to an eminent writer like Sirdar D. K. Sen.

These treaties have not the character of conveyances except perhaps the rendition treaty of 1881 with Mysore. They are not law-making treaties nor are they akin to charters of incorporation. They are treaties having the character of contracts. The fact is that these treaties, engagements and *sanads* were made on a basis of equality in the eighteenth century. The Court of Chancery held in the *Nabob of the Carnatic* vs. *East India Company*,[5] that the treaty "was the same as if it was a treaty between two sovereigns." But, from the beginning of the nineteenth century, we have treaties "of submission, of obedience, of protection, and of subordinate co-operation."

According to Professor Hall, these treaties "really amount to little more than statements of limitations

[5] 2 Ves., at p. 60.

which the Imperial Government, except in very exceptional circumstances, places on its own action. No doubt this was not the original intention of many of the treaties, but the conditions of English Sovereignty in India have greatly changed since these were concluded and the modifications of their effect which the changed conditions have rendered necessary are thoroughly well understood and acknowledged."[6]

It is the opinion of Dr. A. D. Mcnair that when one turns to the "contractual kind of treaties, those which embody bargains between the parties regulating their future conduct or confer mutual rights of trading or fishing for their respective subjects, ex-territoriality treaties, treaties creating rights in the nature of servitudes of a non-political nature," one is in the realm of different ideas from true law-making treaties. It is in the sphere of this kind of treaty that the "*rebus sic stantibus*" doctrine will find its development on the legal side.

Like the doctrine of frustration of contract in British municipal law, *rebus sic stantibus* is really a device by which the rules as to absolute contracts are reconciled with "a special exception which justice demands" in the words of Lord Sumner. It is considered a legal and not

[6] Hall, *International Law*, VI Ed., p. 27. Footnote.

a diplomatic doctrine by Sir John Fischer Williams.[7] But Professor Brierly calls it a "pseudo-legal principle." The attitude of international law to oppressive or obsolete treaty obligations is attempted to be solved by many text-book writers through applying the doctrine of *clausula rebus sic stantibus*.[8]

Three instances are found cited by Professor Bryce. In the Treaty of Paris (1856) Russia had promised to maintain no navy in the Black Sea. But in 1871, she announced that she would no longer respect this provision at the time of war between France and Germany. Further a clause in the Treaty of Berlin (1878) bound Russia not to fortify the harbour of Batum on the Black Sea. But in 1886 Russia declared that she would disregard this provision. The comment of Bryce is that "both these treaty obligations had been imposed upon Russia at a time when the forces arrayed against her were too strong to be resisted. She accepted them under a sort of duress."[9] Again, Count von Aehrenthal, the Foreign Minister of Austria-Hungary, declared his intention of

[7] A.J.I.L., Vol. XXII, pp. 89-104.

[8] Vide *Hirji Mulji et al.* vs. *Cheong Yue Steamship Co., Ltd.*, 1926. A.C. 497. Also 1921, 2 Ch. 331; for a discussion of the topic *vide* K. R. R. Sastry's article in the *Canadian Bar Review*, Vol. XIII, pp. 227-229; also Sastry's *International Law*, pp. 177-200.

[9] Bryce, *International Relations*, pp. 168 ff.

annexing Bosnia "which had been assigned to Austria under the treaty of Berlin," to be occupied by her without prejudice to the Sovereignty of Turkey.

This doctrine has been considered by the German Court in the *Free Hansa City of Brennen* vs. *Prussia* (on June 19th, 1925). The Court is reported to have held in the case that "international law recognises to a large extent the possibility of the termination of treaties in accordance with the principle of *rebus sic stantibus*; but it negatived the applicability of the principle in the particular case."[10]

Among the distinguished writers, Professor Hall observed that "the treaties themselves are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved or even when the interests of the subjects of the native princes are gravely affected." Sir W. Lee Warner developed the theme of applicability of the doctrine of *rebus sic stantibus* thus :—

> "Treaties and engagements of the Indian States cannot be fully understood either without reference to the relations of the parties at the time of their conclusion or without reference to the relations

[10] *Vide* Sir J. F. Williams, *Chapters on Current International Law and League of Nations*, p. 111.

since established between them. As Wheaton observes, 'the moment those relations cease to exist, by means of a change in the social organization of one of the contracting parties of such a nature and of such importance as would have prevented the other party from entering into the contract had he foreseen the change, the treaty ceases to be obligatory upon him.' The resignation by the Peshwa of Sovereignty in 1818, the trial of the Emperor of Delhi, the transfer of the Company's rule to the Crown, and the deposition of the Gaekwar of Baroda are the historical events which affect Indian States and modify phrases of equality and reciprocity."

For the applicability of this doctrine there are two limitations. The changes in the circumstances must be vital and the state trying to release itself must give "reasonably sufficient" notice. The political changes between 1818 and 1858 were real and vital. The case for the applicability of the *Clausula* would be complete were it not for the statutory ratification of the treaties and the wide proclamation respecting their "dignities, rights, and privileges" in 1858, 1903, 1911, 1919 and 1921. Later ratification really cuts across the application of this pseudo-legal principle of text-writers.

Among recent writers, Dr. Mehta states that "as regards treaties, it will be conceded that they alone can neither obstruct development nor prevent a change in the relative position of the contracting parties. The actual relations therefore have to be estimated in the light of the conditions prevailing at the time of the interpretation of the treaties and not at the time when they were made."[11] This is the proper view for the practical statesman and the subjects of Indian States are concerned only with the "rules and usages by which the relations of the British Government and the States are and have been governed" (per Sir P. S. S. Iyer). This is stressed again by Mr. N. D. Varadachariar when he lays down that treaties are to be regarded as "guides of political conduct rather than sources of legal rights."[12]

A *sanad* is a "diploma, patent or deed of grant by a sovereign of an office, privilege or right."[13] As regards thus the interpretation of these treaties, engagements, and *sanads* excepting with regard to specific rights or prerogatives which have been specially granted to individual princes, these treaties which have been entered into at a time when the political status of both the British Govern-

[11] Dr. Mehta, *Lord Hastings and the Indian States*, p. 246.

[12] N. D. Varadachariar, *Indian States in the Federation*, pp. 20-21.

[13] Lee Warner, *The Native States of India*, p. 38.

ment and the princes was far different from what it is at present, have to be interpreted according to the political relationship that exists at present in practice.[14]

Instruments of Accession

§6, Government of India Act, 1935, provides a method whereby the States may accede to the Federation and deals with the legal consequences which flow from the accession. The Government of India Bill used the following words:—

> "His Majesty has signified the acceptance of a declaration made by the Ruler thereof." The amendment in the Act into an "instrument of accession" was introduced to "make it clear that the Instrument of Accession is the operative document."

It is to be noted that the term "instrument" used in the Act clearly differentiates it from the term "treaty." The rules of interpretation that will be applicable to these instruments of accession will be those which govern statutes. No extrinsic evidence "of the intention of the

[14] The author is indebted to the eminent lawyer Dewan Bahadur S. Aravamudu Iyenger of Hyderabad for valuable suggestions.

parties to the instrument, whether at the time of executing the instrument or before or after that time is admissible."[15] Even if these instruments were deemed to be akin to treaties—they certainly are not treaties which can be registered at Geneva or interpreted at the Hague—an English Court does not in general regard itself as "being at liberty to examine the negotiations preceding the formation of a written contract or the proceedings in Parliament during the passage of a Bill for the purpose of ascertaining the meaning of the contract or the Statute and the practice is apparently the same when the court is invited to construe a treaty."[16]

It is a well-established doctrine of the constitutional law of the British Empire as evident from the catena of decisions starting with *Queen* vs. *Burah*[17] that the grant by Parliament of legislative powers to Colonial and Indian legislatures implies "plenary powers." In this setting, the interpretation of the instrument of accession far from being narrow, is bound to be affected by the doctrine of "implied powers" in determining the extent and validity of federal legislation on federal subjects as "accepted" by the States.

[15] *Shore* v. *Wilson*, 1842. 4 St. Tri. N. S., App. 1370.
[16] *Porter* v. *Freudenburg*, 1915, 1 K. B. 876.
[17] 1878 (3) A.C. 889.

CHAPTER X

RESTATEMENT OF LEGAL POSITION

There are two ways of looking at this legal-cum-political problem. One is a legalistic view; another is the view of practical statesmanship. The two views have been well represented by Sir Ramaswamier and Sir Shanmukham Chetty respectively.

The valuable historical narrative given out by Sir Ramaswamier himself gives the unerring clue to the path to be treaded by responsible statesmen in Indian States. The shackles of treaties of the eighteenth and nineteenth centuries—these treaties have not merely become "moth-eaten" but thanks to the farseeing statesmanship of the Rulers and their advisers at Mysore, Travancore, and Cochin, have in vital parts run into desuetude—have not as *a matter of fact* interfered with the day-to-day administration of the State. Since 1927 the "practice of the British Government being consulted in all appointments" in Travancore carrying a salary of Rs. 500 p.m. has been "given up on its own volition" by the Paramount Power. No longer are judgments of Criminal

Courts involving death sentence or life imprisonment sent up to the political agent. Under the treaties at Travancore, His Highness had stipulated that he would not admit any European foreigners into his service without the concurrence of the English Government. The many important constitutional steps taken by Mysore, Travancore and Cochin under the trammels of the old treaties, indicate the pace and quantum of progress possible after persuading the Paramount Power. Cases where the advice given by the Paramount Power had to be adopted in Travancore were also illustrated by "the Interportal Convention, the Periyar lease, and various other matters." Able lawyer that Sir Ramaswamy Iyer is, he has argued with remorseless logic in a legalistic vein that "the question of responsible government (in the states) is a matter bound up with the relations between the Paramount Power and the Maharaja."

A lesson may at this stage be taken from the all-too-chequered history of Art. 19 of the League of Nations' Covenant. Under the article, the League Assembly "may from time to time advise the reconsideration by members of the League of Treaties which have become inapplicable." Its interpretation by Lord Robert Cecil was thus stated: "As regards the legal meaning to the text of Art. XIX, there is in my opinion nothing to imply that any special class of treaties

is excluded."[1] The vindictive clauses of the Versailles Treaty against Germany were never brought under this article for "reconsideration." Unilateral repudiation of treaties, development of the Nazi regime in Germany, the Austrian Anschluss, march into Sudetanland and later into the whole of Czechoslovakia—these chapters in German history were due to vindictive and impossible clauses of the abortive Treaty of Versailles. The lesson is that a mere expression of a pious hope in Art. XIX of the League, led to no results. Invaluable as Earl Winterton's declaration has been, it is equally necessary for the Paramount Power *to follow up the declaration* by suggesting to the Rulers the desirability of willingly responding to the signs of the times. The advice to the smaller States by Viceroy on March 13, 1939 is a welcome instance of this following up. Since these small States could not by themselves "provide for the requirements of their people in accordance with modern standards" they have been advised to "take the earliest possible steps to combine with their neighbours in the matter of administrative services so far as this is practicable." The slender resources of the numerous petty States could ill fit them separately to discharge the functions of a modern government. The decision of

[1] *Transactions of the Grotius Society*, Vol. XVIII, p. 166.

the Paramount Power to refer the question of "the construction of the document of the Rajkot Ruler" to the arbitration of the learned Chief Justice of India, is yet another instance of the helpful attitude of the Paramount Power.

In such a setting, building up a purely legal argument for the *status quo* is unfair to the remarkable flair for action associated with Sir Ramaswamier, the statesman. Steps on the part of the major states to transform themselves through their own "volition" into constitutional monarchies of the type of the King of England have to be taken. It is just these steps that Sir Shanmukham had in mind when he spoke "of the necessary adjustments that will have to be made."

What legally are then these "necessary adjustments?" "The final residuary power" will have to be preserved in the Ruler. Such a result can be legally achieved provided the following powers are *reserved* to the Ruler in the constitution:—

1. Matters relating to the person and family of the Ruler.
2. Prerogative powers of the Ruler e.g., right of pardon, right of summoning, proroguing, and dissolving the legislatures, right of veto to legislation.

3. The States' relations with the Paramount Power including all its admitted obligations to the Paramount Power.
4. The States' relations with other Indian States.

In all the constitutions of Indian States where there is machinery for associating the governed in the making of laws as in Mysore, Travancore, Cochin, Baroda, Jammu and Kashmir, and Aundh, these clauses of reservation are found. The "dyarchic" constitution set up in Cochin through the statesmanship of the Maharaja ably advised by Sir Shanmukham is in this setting, a land-mark, really "a startling gesture to the people of Cochin, the first of its kind." (Sir A. Bannerji).

A harmonious understanding between the Princes, the British Indian politicians, and the State-subjects is essential to bring into being the "Federal Executive" and the "Federal Legislature." The only hope lies in "a strong central all-India democratic Federal constitution at the centre, in which the Indian Princes through their democratically chosen representatives will take an honourable part."

CHAPTER XI

THE PRINCES AND THE PEOPLE

The eminent Indian lawyer and statesman, the Rt. Hon'ble Sir T. B. Sapru has well stated the difficulties of the problems of the Indian states thus:—"The temptation to indulge in legal and constitutional theories not wholly applicable to the facts as we find them is as great as the temptation on the other hand to take shelter behind the theories of the divine right of kings and conceptions of government wholly inconsistent with the spirit of the time."[1] The relationship between Rulers and their subjects has to be so progressively altered that the best elements of Indian kingship can be preserved amidst insistent modern demands of awakened political consciousness.

There is a well recognized duty of the Paramount Power to protect the States against rebellion and insurrection. This is derived from treaties, engagements and *sanads*, usage, and the promise of the Crown to

[1] In his foreword to G. N. Singh's *Indian States and British India*, p. viii.

maintain unimpaired the privileges, rights and dignities of the Princes, made in the Proclamation of 1858, Edward VII's Coronation Message, George V's Coronation Message of 1911, and the Proclamations of 1919 and 1921. As the Indian States' Committee put it, "this duty imposes on the Paramount Power corresponding obligations in cases where its intervention is asked for or has become necessary. The guarantee to protect a prince against insurrection carries with it an obligation to enquire into the causes of the insurrection and to demand that the Prince shall remedy legitimate grievances and an obligation to prescribe the measures necessary to this result."[2] The case at Jodhpur in 1827 when there was an insurrection of important nobles of the Jodhpur State serves at once as a warning and demarcation of the boundary. While the Ruler of Jodhpur demanded assistance of the Paramount Power, the British Government declared "that although it might perhaps be required to protect the Maharaja against unjust usurpation or wanton, but too powerful rebellion, there was no obligation to support him against universal disaffection, and insurrection caused by his own injustice, incapacity and misrule."

The promise of the King-Emperor to maintain

[2] Para 49. Indian States' Committee.

unimpaired, the privileges, rights and dignities of the Princes carries with it a duty to protect the Princes against attempts "to eliminate him and to substitute another form of government." If these attempts were due to misgovernment on the part of the Prince, protection would only be given on the conditions of inquiring into the causes and remedying legitimate grievances. If the attempts are due to a widespread demand for change, the Indian States' Committee state, that "the Paramount Power would be bound to maintain the rights, privileges, and dignity of the Prince but it would also be bound "to suggest such measures as would satisfy this demand without eliminating the prince."[3] It has to be stated that the Indian States' Committee could not deal with the problem of the States' subjects as it was outside their terms of reference.

The relevant treaty provisions in this behalf which *ex faci* contain an agreement on the part of the Paramount Power not to "interfere in the internal affairs" of the Indian States can be extracted from the following typical treaties:—[Art. 15. Treaty of 1800 with Hyderabad. But the Company's Government did interfere in 1804 and 1820. Chandu Lal's regime and the highly questionable financial transactions of Palmer and Co.

[3] Para 50. Indian States' Committee.

strike one as suggestive landmarks. Art. I of the Treaty with Kashmir of 16th March, 1846, Letter from the Governor of Bombay to the Gaekwar, 8-2-1841; Art. 9 of the Treaty with Udaipur 1818; Art. 8 of the Treaty with Jaipur, dated 2nd April, 1818: Art. 3 of the Treaty with Jodhpur, dated 15th January, 1804 and Art. 9 of the Treaty with Jodhpur, dated 6th January, 1818; Art. 3 of the Treaty of Bahawalpur, dated 22nd Feb., 1833; Art. 9 of the Treaty with Bikaner of 9th March, 1818; Art. 8 of the Treaty of Alliance with Gwalior, dated 27-2-1804; Art. 3 of the Treaty with Alwar of 19th December, 1803; Art. 9 of the Treaty of 1818 with Bhopal; Art. 10 of the Treaty of Protection and Guarantee with Cutch in 1819].

In the treaty with Travancore of 1805 there is in Art. 9 "a promise to pay at all times the utmost attention to such advice as the English Government shall occasionally judge it necessary to offer to him" in a number of specified and general matters which *ex faci* cover all branches of internal administration. Colonel Munro combined in himself both the inconsistent posts of Dewan and Resident. A succession of petty third-rate Dewans till Sir T. Madhava Rao's times must have helped such detailed interference by the political agents in a State belonging to an ancient and loyal ally.

Clause 9 of the Treaty with Cochin of 1809, which

is a treaty of perpetual friendship, certainly restricts the power of the Princes to introduce material changes in the administration without the advice of the British Government. While the experienced Ruler of Cochin ably aided by the talented Sir Albion R. Bannerji could not introduce reforms in 1912 owing to the stern warning of the Paramount Power, real reforms could be had only from 1925 when Cochin got her Legislative Council.

So far as Mysore is concerned Art. 14 of the Treaty with Mysore, dated 22nd June, 1799 containing detailed provisions of interference in internal administration, has supplied the verbatim original to Art. 9 of the Treaty with Travancore of 1805. In the Instrument of Transfer of 1881, under clause 20 "no material change in the system of administration, as established when the Maharaja Chamarajendra Wadiar Bahadur was placed in possession of the territories, shall be made without the consent of the Governor-General in Council." Even under the Mysore Treaty revised in 1913 there is a clause that no material change in the administration in force should be introduced without the consent of the Governor-General in Council.

Typical of an engagement of vassalage and suzerainty is the Mundee Sanad of 1846. The Preamble states *inter alia* that "the British Government shall be at liberty

to remove anyone from the *guddee* of Mundee who may prove to be of worthless character and incapable of properly conducting the administration of his State, and to appoint such other nearest heir." Article 5 of the Sanad reminds one of "*servitum*" when it directs that the Ruler "shall.....whenever required, join the British army and be ready to execute whatever orders may be issued to him by the British authorities and supply provisions according to his means."

In any dispassionate study of this question it is necessary to remember the consequences of an aggressive policy of reducing all the States "to conform to a single type." When the British Government brought the States under its protection "it must be admitted that the British weakened the efficacy of checks" on the abuse of autocracy.[4] At the same time a galaxy of British officers and statesmen as Lord Metcalfe, Malcolm, Munro, Lord Minto, Lord Reading, Lord Irwin (now Viscount Halifax) and the Marquis of Linlithgow have done not a little to introduce civilized forms of administration in Indian States. Political propaganda has produced such unbalanced literature regarding the condition of State-subjects on either side that it is hardly realized that conditions in Indian States might have been

[4] Sir Sydney Low: *The Indian States and Ruling Princes*, p. 22.

infinitely worse if the Paramount Power had not interfered on behalf of State-subjects. "For the way in which one man of honour must treat another read Lord Minto" —This is a very just tribute to Lord Minto.[5] The Irwin Memorandum circulated to Indian States in 1927 is a model of advice persuading the medieval-minded among the Princes to have a civilized, incorruptible administration with an "efficient judicial system secure from arbitrary interference by the executive." The canons of taxation were reiterated and it was stated that "every Government should have some machinery by which it can inform itself of the needs and desires of its subjects and by which these can make their voice heard." The proportion of revenue allotted to the personal expenditure of the Ruler should be, it was wisely stated, "as moderate as will suffice to maintain his position and dignity." This was very properly called the "minimum of good government applicable to all States."

The Chamber of Princes, an advisory and consultative body, was established in 1921 as a recommendation of the Montagu-Chelmsford Report. It illustrates the abandonment of the old policy of isolating the States from each other. The remark of Sir P. S. Sivaswamier that the Princes are "afraid of the levelling tendency

[5] MacMunn: *The Indian States and Princes*, p. 165.

of any organization of this sort" has had confirmation from the Princely order itself. In February 1928 in response to the Irwin Memorandum, the Chamber of Princes passed a Resolution which urged on the Princes—

(*a*) "a definite Code of Law guaranteeing liberty of persons and safety of property, administered by a judiciary independent of the executive,"

and (*b*) "the settlement upon a reasonable basis of the purely personal expenditure of a Ruler as distinguished from the public charges of administration."

Mere passing of a resolution with "utter disregard shown by the majority of the Princes in carrying out the terms of the resolution" has been properly characterized as "a political blunder," which later was "to weaken their position at least from a moral point of view."[6]

The demand of the State-subjects for responsible government was bound to be made with the working of national governments in British Indian provinces. The Government of India Act 1935 has had criticism all round from the Liberals, the Congress, and the Princely Order. It was the result of compromise and many adjustments. All the progressive forces in the country

[6] Maharaj Kumar Raghubir Singh, *Indian States*, 1938, p. 89.

along with eminent constitutional lawyers as Professor A. B. Keith, have been criticising the federal plan on two among other grounds. The nominees of the Rulers would be a sort of deadweight on the political progress of the country and this would be accentuated by the apprehension that the representatives of the States would be nominated by the Rulers themselves. As Sir Albion Bannerji said, "the second was the cause of the apprehension expressed in the first. Even such distinguished British statesmen as Lord Samuel and Lord Lothian have suggested that some method of selection acceptable to the people of the State has to be introduced before the Federation can ever come into being and that the Rulers have to transfer some of their sovereign authority to the representatives of their people and also allow freedom and liberty of person and of speech."[7]

Earl Winterton made a famous declaration in Parliament on February 21st, 1938 on behalf of the Secretary of State for India that the consent of the Paramount Power had not been required before any proposals for constitutional advance were approved by the Princes. This was again repeated by the Under-Secretary of State for India in a written statement on 16th December,

[7] Speech of Sir Albion Bannerji at the East India Association, London on 18-10-1938.

1938 that "the Paramount Power will not obstruct proposals for constitutional advance initiated by the Rulers. But His Majesty's Government have no intention of bringing any form of pressure to bear upon them to initiate constitutional changes. It rests with the Rulers themselves to decide what form of Government they should adopt in diverse conditions of Indian States."[8]

The Under-Secretary for India gave another written reply in the House of Commons bearing on the continued obligations of Rulers to the Paramount Power on April 6th, 1939:—"The policy indicated in the reply on December 16, 1938 does not imply and is not to be taken to imply that the Paramount Power would recognize a Ruler as having endowed any constitutional body which he may create with a greater degree of authority than that which he himself is recognized as possessing. No State would be regarded as relieved of its obligations to the Paramount Power by the fact that the Ruler divested himself of the control necessary to discharge them and the Paramount Power would remain free to take such steps as might be required to ensure their fulfilment." This clarifying statement serves to stress

[8] Also *vide* reiteration of this policy by the Viceroy in his speech to the Chamber of Princes, 13th March, 1939.

two points of view. Firstly, whatever be the nature and power of the representative institutions within an Indian State, that State "could not relieve itself from its obligations to the Paramount Power." It is an advice in the nature of a direction to the Ruler that even if he is willing to grant all the powers of internal sovereignty recognized to be vested in him to his Legislative Assembly, that could not relieve him of his obligations to the Paramount Power and that the Paramount Power "would remain free to take such steps as might be required to ensure their fulfilment."

Secondly, if in any constitution to be granted in a State, a Ruler creates legislative organs "with a greater degree of authority than that which he himself is recognized as possessing," it should not be taken that the Paramount Power would impliedly "recognize" such a constitutional situation through its recent policy of "not obstructing constitutional advance initiated by Rulers."

The echo of the theory of the Indian States' Committee is again heard of the Paramount Powers, view that States possess only such autonomy as "*is recognized*" (italics mine) by the Paramount Power who alone is the authority to delimit the 'subordination' of the Indian States, in the light of "treaties, engagements, and sanads, supplemented by usage and sufferance and by decisions of the Government of India and the Sec-

retary of State embodied in political practice."

In a remarkably learned and subtle address in the Sri Mulam Assembly, Travancore on February 2nd, 1938, Sir C. P. Ramaswami Aiyer has developed the position that "legally, it is not possible without the active concurrence of the British Government for the Ruler to divest himself of his undivided authority and jurisdiction over the governance of his State in favour of any other authority." Sir R. K. Shanmukham Chetty, though aware of the legal difficulties so well developed by Sir Ramaswamier, stated that "the problem though bristling with difficulties was not insurmountable." As Sir Shanmukham followed it up, "the necessary adjustments that will have to be made in case a scheme of responsible government is to be introduced in the State," have to be studied afresh *vis-a-vis* the relationship between the State and the Paramount Power. After referring to §§2, 3(2), 6, 12(*g*), 14, 101, 125, and 145 of the Government of India Act 1935, Sir Ramaswamier evolved the proposition that the Ruler of an Indian State is the person who is a legal entity and who is alone personally responsible. The author's respectful submission is that as a bare technical proposition in law read in the context of the two treaties of 1795 and 1805, binding Travancore with the Paramount Power, the statement leads one into a dexterous cob-web of legalism.

Practical statesmanship of which Sir Ramaswamier is an illustrious representative, consists in following up the helpful declaration of Earl Winterton. Assistance has been got from the suggestion of Sir Albion Bannerji that in spite of the responsible utterance of the Earl of Winterton, the question arises who is to make the move first, the Princes or the Paramount Power? He again stated that the Treaties e.g., with Mysore, Travancore, and Cochin *have to be revised.* As he put it, "as the treaties stand, the position is somewhat different, unless the declaration referred not to the past but to the future." This he illustrated with reference to Cl. 9 of the Cochin Treaty of 1809 and the Mysore Treaty of 1913. The legal issue is, will a statement in the House of Commons that the Paramount Power "will not obstruct" proposals for constitutional advance be held sufficient to do away with the obligations under bilateral treaties? In a narrow legalistic view, the position taken by Sir Ramaswamier is correct in the face of existing treaties governing Travancore, Cochin, and Mysore. Revision of these treaties appears thus a condition precedent *in strict law* so far as the above-mentioned States are concerned.

The Minorities' Issue

Experience has shown that in the early stages of responsible government, the minority communities

hesitate to trust to the wisdom and reasonableness of the majority. Two remarkable Reforms Reports have been published recently in Hyderabad and Mysore. The repercussions of British Indian experience have had reactions in the two States as well. The Committee in Hyderabad presided over by an eminent lawyer came to the conclusion that "the signs and portents of the time were very disconcerting." Taking a cue from the profound remarks of Sir Brajendranath Seal in 1923 that "*Facultative Representation*" will prove an influence for unification and concord, the Hyderabad Reforms Committee set the following question realistically to themselves:

> Why the worn-out method of territorial representation should not be set aside and facilities for cooperation and for the evolution of a sound economic order should not be sought through a system of *representation by interests*?"

Territorial constituencies have been ruled out, and instead occupational constituencies based on the economic *motif* are envisaged. The arguments of the able Chairman of the Hyderabad Reforms Committee in favour of functional representation are masterly, and this interesting experiment in the premier state of Hyderabad deserves careful study of publicists and constitutional lawyers. While Hyderabad state deserves to be congratulated on its adoption of joint electorates and

rejection of separate electorates the Muslims who constitute 11% or 12% of the population are to be given equal representation with the Hindus both among the elected and nominated members. *This is weightage indeed*!

Passing on to the state of Mysore, the Reforms Committee (a majority of them) felt that

> the communal electorates would practically break up that close unity of interests between the Hindus and Muslims which has been a happy characteristic of the relations between the two communities in Mysore and would retard the growth of a sense of common citizenship.

The Committee unhappily did not follow up their views in their recommendations. They gave in where their better sense persuaded them to the contrary when they left the "final say in the matter to the choice of the community itself." (para 160). But the Dewan of Mysore has allowed the 'unanimous' desire of the Muslim community (the Reforms Committee only mentions the phrase "almost unanimous" in para 159) to weigh in favour of a separate electorate. Mysore, for all practical purposes, has the political consciousness of British India; and an unhappy lead has been given by introducing the fissiparous and centrifugal system of separate electorates. The expression of a fond hope by the Government that the "system will not retard the growth of a sense of common citizenship" is belittl-

ing the pregnant observations of the Hyderabad Reforms Committee that "the signs and portents of the time are, indeed, very disconcerting." It is even now not too late to mend this introduction of a virus into the erstwhile sound body-politic of progressive Mysore.

What is Meant by a Minority?

When the "legitimate interests" of minorities were deemed necessary to be protected under the 'special responsibilities' of Governors, the demand by the Indian delegation to define them has been left unanswered. Obviously, the term has no reference to the 'political' minorities. (*Vide* para 79, Joint Parliamentary Committee Report). It is at this stage instructive to refer to the solution of the minorities' problem by the League of Nations.

Though the protection of racial, linguistic and religious minorities in the sphere of international law is not an innovation introduced by the post-Great War treaties, for the first time in diplomatic history, a new body called the League of Nations was entrusted with the task of guaranteeing the stipulations concerning the position of minorities. Minorities Treaties, Declarations and Conventions were evolved to solve particular problems in different European countries. The creators of the system had no intention of establishing a

general jurisprudence applicable wherever racial, religious or linguistic minorities existed. In fact, the Lithuanian delegation's attempt in 1925 to evolve a draft Minorities Convention to include all States Members of the League proved unsuccessful.

The opinion of M. de Mello Franco (Brazil) as *rapporteur* on minorities questions is entitled to great weight. In his view:

> The mere co-existence of groups of persons forming collective entities, racially different in the territory and under the jurisdiction of a State, is not sufficient to create the obligation to recognize the existence in that state, side by side with the majority of its population, of a minority requiring a protection entrusted to the League of Nations. In order that a minority, according to the meaning of the present treaties, should exist, it must be the product of struggles going back for centuries or perhaps for shorter periods, between certain nationalities and of the transference of certain territories from one sovereignty to another through successive historic phases.[9]

It is also worthy of note that the Permanent Court of International Justice has consistently discouraged the attempts made to weaken the protection of minorities.[10]

[9] *League of Nations and the Protection of Minorities*, p. 19.

[10] (Vide P.C.I.J. Series B. No. 6, pp. 23-24, Series A/B No. 447 p. 28, Series A. No. 7, p. 32, Series A/B No. 61, Series B. No. 12).

Judged by this test of a minority, the Muslims in Hindu states and *vice versa* may just qualify for it. Minorities can legitimately demand statutory and justifiable safeguards to preserve their racial, religious, and linguistic characteristics.

It is a bitter lesson borne out from British Indian experience since 1909, that special communal electorates have contributed to the malady of dividing body-politic into fissiparous fissures. The Hyderabad solution of facultative representation is an interesting experiment.

Stages to Responsible Government

It has to be conceded that one long jump at a stretch should not be taken from undiluted autocracy to responsible government. The successful and stable establishment of *Swaraj* is best attempted gradually and by stages.

What are these stages? The nature of the constitution, the necessary legal safeguards to preserve the dignity and status of the Ruler, and the steps to be taken to entrust the representatives of the people with power have to be solved in the major states—which can afford to have the law-making machinery after sufficient enquiry and detailed examination. Mysore, Cochin, Travancore, Baroda, Jammu and Kashmir, and Hyderabad have shown the other states how to begin with

enquiry and follow it up by suitable reforms.

The Cochin Experiment of 'Dyarchy' has been generally praised and also criticised. The alternative of an *undivided executive* responsible to the Ruler with some of them chosen from a popularly elected legislature has been followed by Mysore and Baroda in their latest Reforms.

Whatever be the executive suited to the particular state, the objective should be to *preserve the best elements of Indian Kingship amidst modern surroundings.*

It is the conviction of this writer that under modern conditions, the innumerable petty principalities could not have the minimum of civilized administration through administrative groupings under the leading strings of the Political Agent. *A necessary preliminary is their amalgamation into adjacent Provinces or neighbouring states.*

Nor can an arm-chair regrouping of Indian States into 21 Major States and amalgamation of all the rest be permitted at a stretch. The problem has to be faced through the appointment of a Royal Commission after this War, facts have to be found, historical sentiment and traditions have to be suitably respected, and re-grouping has then to be made, with such alterations of treaties, engagements and *sanads*, as would be necessary to suit the changed circumstances.

Constructive thinkers are busy discussing the shape of things to come after the present turmoil in Europe; a federation of "like-minded peoples" with a federal executive in charge of Foreign Affairs, Defence, and Finance controlling these two federal services, is being discussed in influential circles. The sovereign states of Europe born through 'Balkanization' and the policy of encirclement are sure to undergo transformations to suit the conditions after this European War. In such a *posse* of affairs, there would be absolutely no place for petty principalities which cannot maintain even a magistrate and a schoolmaster. These innumerable estates and Jagirs were necessary in differing degrees of subordinate isolation in the nineteenth century; at present, far from being points of strength they have become sources of weakness all-round. The Paramount Power would be doing its overdue duty by scientifically solving this problem of tiny states so that India could start with strong and stable units of federation. *Reforms in these petty principalities can be had only after their amalgamation into adjacent provinces or states.*

CHAPTER XII

TERRITORIAL REARRANGEMENT OF INDIAN STATES

The Indian States' Committee graded the then 562 Indian States into three classes:—

I.	States, the rulers of which are members of the Chamber of Princes in their own right	109
II.	States, the rulers of which are represented in the Chamber of Princes by twelve members of their order elected by themselves	126
III.	Estates, Jagirs and others	327

The first two classes have "in greater or less degree, political power, legislative, executive, and judicial over their subjects."

The petty states of Kathiawar and Gujerat numbering 286 out of 327 in the third class are organized in groups called *Thanas* under officers appointed by the local representatives of the Paramount Power who exercise various kinds and degrees of criminal, revenue,

and civil jurisdiction. The area of 109 out of these little states is from 10 to 100 square miles, of 116 is from 1 to 10 square miles, of 13 is even less than one square mile.

Sirdar D. K. Sen classified Indian states under seven divisions graded according to their respective *de jure* and *de facto* status. It has become a moot question whether these series of relationships that have grown up between the Crown and the Indian Princes "under widely differing historical conditions" have not been made gradually to conform to a "single type." In his well-known letter to H. E. H. the Nizam dated 27th March 1926 on the Berar issue, the hard fact of subordination of the Nizam to the Paramount Power was thus stressed:—"I will merely add that the title "Faithful Ally" which Your Exalted Highness enjoys has not the effect of putting Your Government in a category separate from that of other states under the Paramountcy of the British Crown."

With only 40 states there are treaties; the relationship with the rest is through *Sanads* and engagements. A medley of States, Jagirs, and petty principalities persist in India owing to the *might of the Paramount Power*. Lord Reading in another context was only stressing the cold reality when he stated that "the internal no less than the external security which the Ruling Princes en-

joy is due ultimately to the protecting power of the British Government." In their status as protected dependent states, there is every variety from the proud position of the once 'Great Nawab,' the Nizam of the Deccan, to the big states as Kashmir, Baroda, Gwalior, Mysore, and Travancore, and proud Rajput states as Udaipur, Bikaner, and Jodhpur down to many petty principalities one of which Bilbari has 27 souls. The post-Mutiny imperial policy of stabilization led to the recognition and maintenance of many disintegrated elements of previous dynasties. In the illuminating survey of the original status of the petty Orissa states made by the Orissa Enquiry Committee, the "inherent inability of the Orissa States to support popular enlightened administrations within their areas" is very properly put as a ground for the cancellation of the *Sanads* of these petty Orissa States.

The Vicious Circle

Autocracy of the East had a check in public opinion. A military conqueror with a mercenary army could get along provided his administration be not too unpopular. Rioting, revolt, or dynastic conspiracy would shorten the career of misgoverning despots. Sir G. Macmunn from his abundant experience has pointed out that "in untrammelled Eastern Countries the remedy

against unbearable despotism is mutiny, rebellion or palace-murder. Against these fates, the strong hand of Britain guarantees the incumbents of the princes, throne." The Paramount Power *is thus directly responsible for the varieties of misrule in many Indian States.* In cases of "gross misrule" where people are goaded by desperation to the verge of rebellion the Paramount Power has indeed interfered. When across the all-too-thin frontier there is civil liberty, impartial justice, security of private property and responsible government to a degree, why should the state-subjects alone wait every time for their *sufferings to reach particular intensity* as to attract the intervention of the Paramount Power? Except a few well-governed states how many of these petty bolstered up relics of medieval barbarism could have existed with their territorial integrity, once the big arm of the Protecting Power had elected to remove herself from the vortex of affairs? Illustrious Sir Henry Maine had observed as early as 1864 that the petty Kathiawar States would have "hastened to utter anarchy" if the Paramount Power had not "interfered for their settlement and pacification."

India's Federal Destiny

A Federation can alone solve the Indian Problem. The association of modern democracies with "feudal

autocracies" can never be a permanent solution. The few enlightened Indian States with their civilized and responsive systems of administration are oases in a desert of denial of civil liberty. The '*Statesman*' has done a distinct service by laying down the lesson of history that "unbridled power inherited from generation to generation has throughout history led to tyranny, corruption and degradation of the worst kind." Elsewhere, on the footing of the existing Treaties, engagements and Sanads, the legal part of the problem has been examined that the obligations to the Paramount Power *can be discharged* while the despots of Indian States *choose to evolve* as constitutional monarchs.[1]

The size and the income of many of these small jagirs had been *permanent impediments* in the way of a minimum standard of civilized administration. Periodic sermons by successive Viceroys since 1927 have had little effect. That new body "Chamber of Princes" has thus far bestirred all its efforts to preservation of treaty-rights and remedy of their economic grievances. The Paramount Power's historic declaration of February 1938 is having the same result as the pious Article XIX of the League of Nations Covenant for peaceful alteration of Treaties.

[1] K. R. R. Sastry. *Indian States and Responsible Govt.* 1939.

Territorial Rearrangement

The emotional extremist would like all the states to be liquidated and the ruling families pensioned off. A doughty thinker and eminent lawyer as S. Sreenivasiengar would prefer to incorporate all the minor States into the adjacent provinces and to make the major states constitutional units in a federal India. The rulers in these major states should become strictly constitutional monarchs. Following the ancient Indian precedents, Mr. Iyengar would prefer that the legislature of each state should elect a qualified member of the Ruling family to be the head of the State for his life.

In his memorable speech to the Chamber of Princes on March 13th 1939, the Viceroy stated that "in no case was there a greater and more immediate need for co-operation and combination than in the smaller states, the resources of which were so limited as virtually to preclude them from providing for the requirements of their people in accordance with modern standards." In this view, the Viceroy advised these small states to take early steps to "combine with their neighbours in the matter of administrative services, so far as this was practicable."

Dr. Pattabhisitaramayya, who has continuously studied the problem of the Indian States' people feels

compelled to state as a solution that "the vast bulk of these states must be merged either with the British Indian territory or as was suggested by the Viceroy amalgamated with the adjoining Indian States." In ultimate analysis he visualizes not more than 50 states—50 constitutional units comprising the territory of 601 states. On a proper readjustment according to a linguistic basis there will have to be 14 provinces. The scheme of Federation which is sound in principle will centre round the problem of federating these 50 units with the Provinces of India. The All-India States' Peoples' Conference held at Ludhiyana in February 1939 recommended that all States with a population below 20 lakhs or an annual revenue of less than 50 lakhs of rupees should amalgamate with neighbouring provinces. If given effect to, only 21 states will remain as separate units and the remaining 580 will be absorbed.

History tells us how the free cities, duchies, bishoprics baronies and tiny principalities were grouped together under the Holy Roman Empire in Central Europe. A similar problem of a number of tiny states faced Germany. It was solved in the only scientific way of these Rulers of States being allowed to retain their titles and some revenue. Their powers were taken from them and their States were absorbed into the German Reich.

The obvious destiny of the small states is to become merged in democratic India. It is *the duty of* the Paramount Power *to take up this problem of the small estates* immediately after the war by appointing a Royal Commission to go into the whole question. The safety of British rule in India, wrote Lord Canning, "is increased not diminished by the maintenance of Native Chiefs well affected to us." His words that "one of our best mainstays will be found in these Native States, when the interests of England elsewhere may require that her Eastern Empire shall incur more than ordinary risk," have proved prophetic. One has only to cite the Panjdeh Incident, the Great War (1914-18) and the present maelstrom in Europe. Conditions of the Indian Problem have vitally changed: the safety of India has rested firmly when Britain had trusted India; the Major states will prove strong constitutional links in the inevitable federal plan, and the small states, a perennial source of weakness all-round, have to be merged in democratic India. The historical antecedents of these petty states and the results of the policy of vacillation and non-interference on the part of the Paramount Power alike justify the exit of these feudal relics. Mr. C. V. Achariar, the veteran Indian publicist, has put the solution of small states thus:—"The innumerable small States, unable to maintain a school or a magistrate should be absorbed

at once either in British India or the neighbouring Indian States."[2]

[2] In his message to the President of the Indian National Congress d. March 14, 1940.

CHAPTER XIII

CONCLUSION

The Nazi reaction to the abortive Treaty of Versailles has given birth to unilateral repudiations of treaties; allied with the Fascist regime, Hitler's Germany has successfully practised the stand-and-grab technique in Czechoslovakia; and the Italian plan has succeeded likewise in annexing Albania. Through the weapon of diplomacy, Herr Hitler has attained his immediate objectives in Poland, Rumania, and Bulgaria. Petty and weak neutral Countries have been ruthlessly subjugated in order that Germany may get her necessary supplies of raw materials. In such a world where international law is regretfully under eclipse, 601 Protected States and Jagirs persist in India owing to *the might of the Paramount Power.*

Looked at from the constitutional side, most of these States are medieval autocracies. In a desert of denial of civil liberty one happily comes across the few oases in the progressive States of Mysore, Cochin, Travancore and Baroda. As Pandit Jawaharlal Nehru has well observed: "The whole question of the States is a

vast and complicated one varying in form and substance in different areas and yet having an underlying unity." All varieties and shades of internal administration ranging from well pronounced internal autonomy to maximum administrative control by the Paramount Power are found. Only 40 States have "treaty" relationships; the more important States alone have internal sovereignty; the internal sovereignty of others is more restricted, and there are many small Jagirs over which the Paramount Power exercises varying degrees of administrative control—this medley of States, Jagirs and petty principalities makes the suggestion of different remedies indispensable. As H. H. the Jam Saheb of Nawanagar, Chancellor of the Chamber of Princes pointed out (on 10th June, 1939) "No genuine well-wisher of the States can reasonably advocate any exact pattern of constitutional or administrative reforms or a uniform pace of progress for one and all the States." But, *there should certainly be a minimum standard of civilized administration in all the States.* The Irwin Memorandum of 1927, and the Viceroy's advice[1] to small States are significant in this connection.

The fundamental civil rights of the people should be placed beyond jeopardy. The reserved residuary powers

[1] His Excellency the Crown Representative's opening speech in the Chamber of Princes, March 13, 1939.

in the Ruler should not clash with these rights. *Liberty of person and safety of private property should be guaranteed legally.* As Sir A. R. Bannerji has well pointed out "security of life and property, an impartial judiciary, a fixed civil list, and the establishment of some form of representative government suited to the local conditions of each State should be *sine qua non* for these territories to be raised to the dignity of federal units."[2] *De facto,* these valuable rights exist in the States of Mysore, Cochin, Travancore and Baroda. One is not able to iterate the same of many other States whose prominence gets publicity in papers and periodicals.[3] Today constitutionally, the most advanced Indian State is the Satara Jagir of Aundh.

A Federation can alone solve the Indian Political Problem. In spite of many safeguards and provisos in the Constitution Act of 1935, the authority of the Federal Government is bound to grow in India. It is a lesson borne out by a study of the doctrine of the constitutional law of the British Empire. When Dominion Status is granted to the Indian Federation—which is the natural promised evolution—federal authority in the federated states will have

[2] *Indian Tangle,* p. 174.

[3] A valuable study of the State Subjects' disabilities is found in Chudgar—*Indian Princes.*

to rest with the federal Government exclusively. In the present hybrid constitution, Paramountcy can be stated to be the only sanction for the enforcement of Federal authority in the Indian States. This will disappear with the evolution of Dominion Status. India's membership of the League of Nations, and the signature of the Treaty of Versailles by the Rt. Hon'ble V. S. S. Sastry and H. H. the Maharaja of Bikaner, on behalf of India—the value of these great constitutional strides would be lost if artificial impediments are allowed to obstruct the path of evolution.

It is a hopeful sign of the times to read the following lines by the Maharaj Kumar of Sitamau:—"Even if one succeeds in stopping all outside interference and efforts to stir up agitation in the States, some degree of responsible self-government cannot be long denied to the subjects."[4] The establishment of responsible Government in the States, it has been well pointed out, is the only way of "restricting Paramountcy to its proper field of action."[5] A paramountcy which preserved "medieval autocracy" for purposes of weightage at the centre would find the federation still-born; such a de-

[4] *Indian States*: Maharaj Kumar Raghubir Singh. (Feb. 1938) p. 388.

[5] N. D. Varadachariar, *The Indian States in the Federation*, p. 146.

velopment would be a precursor to a triangular struggle between the Princes, the British Indian Politicians, and the State-subjects. The States voluntarily moving with the times as e.g., Aundh, Mysore, and Cochin will be assisting in the birth of a renascent federal India, assisted by a Paramount Power which will play its new role begun at Rajkot in "actively" *fostering* such development and array of centripetal forces.[6] In the latter view, the treaties of the eighteenth and nineteenth centuries would run into desuetude, political practice once again playing an overshadowing part. Amidst such a course of constitutional development alone, can India's federal destiny of 'substance of independence' be reached in a non-violent manner, *a la Mahatma Gandhi*.

[6] *Vide* the encouraging tone of the Marquess of Zetland's speech at the dinner of the Liverpool Chamber of Commerce, dated 2nd March, 1939.

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